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Unlawful Treatment of the Handicapped by Federal Contractors and an Implied Private Cause of Action: Shall Silence Reign?

By HARVEY R. BOLLER*

Since antiquity, society has confronted the problems occasioned by the presence of the physically and mentally handicapped.[1] The federal government has recently adopted a new approach to these problems: the integration, to the maximum extent feasible, of handicapped individuals into the mainstream of American society. The passage of the Rehabilitation Act of 1973[2] is certainly the most significant achieve-

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1. Concern for the plight of the handicapped is evidenced at least as early as the Old Testament, which admonishes that "you shall not treat the deaf with contempt, nor put an obstruction in the way of the blind." *Leviticus* 19:14 (New English Bible, Oxford Univ. Press 1970).

For recent literature on the plight of the handicapped today, see PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, ONE IN ELEVEN—HANDICAPPED ADULTS IN AMERICA—A SURVEY BASED ON 1970 U.S. CENSUS DATA 19; Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855 (1975); Wolff, *Protecting the Disabled Minority: Rights and Remedies under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS U.L.J. 25 (1978); Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973).

2. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-961 (1976 & Supp. III 1979)). The Rehabilitation Act has been amended twice, in 1974 and in 1978. See notes 68, 78 & accompanying text *infra*.

The Senate report on the bill that, with some amendments not relevant for present purposes, was ultimately enacted in 1973 indicated that Congress intended to have handicapped individuals more fully integrated into American society. The report observed particular problems suffered by the handicapped, including "employment discrimination, lack of housing and transportation services and architectural and transportation barriers." S. REP. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2078.

The Senate Labor and Public Welfare Committee stated that it had "added provisions to the bill designed to focus research and training activities on making employment and participation in society more feasible for handicapped individuals." *Id.* at 2092. Similar comments were also made on the floor of the Senate during the debate that preceded the

ment in that process.

This Article considers whether a private cause of action can be implied under section 503 of the Rehabilitation Act.[3] This section imposes certain obligations concerning the employment of "handicapped individuals"[4] on contractors and subcontractors who hold contracts

passage of the Rehabilitation Act. *See, e.g.*, 119 CONG. REC. 24,566 (1973) (remarks of Sen. Cranston).

The concept of "mainstreaming" the handicapped into the general population is most clearly articulated in the Rehabilitation Act Amendments of 1974. Pub. L. No. 93-516, 88 Stat. 1617 (codified in scattered sections of 29 U.S.C. §§ 701-961 (1976)). Title III, designated as the "White House Conference on Handicapped Individuals Act," stated Congress' "final objective" to be "the complete integration of all individuals with handicaps into normal community living, working, and service patterns." Pub. L. No. 93-516, tit. III, §§ 300-01, 88 Stat. 1617, 1631 (1974).

3. 29 U.S.C. § 793 (1976 & Supp. III 1979). Section 503(a) provides, in part, that "[a]ny contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title." 29 U.S.C. § 793(a) (Supp. III 1979).

Section 503(b) concerns administrative complaints filed with the Department of Labor alleging that a federal contractor has failed to comply with the provisions of its federal contract with respect to the employment of handicapped individuals. 29 U.S.C. § 793(b) (1976). See note 66 *infra*.

Section 503(c) provides for waivers of the obligations imposed by section 503 by the President of the United States if the national interest so requires because of "special circumstances." 29 U.S.C. § 793(c) (1976).

4. The term "handicapped individual" is defined for the purposes of Title V of the Rehabilitation Act, which includes § 503, as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (Supp. III 1979). In regulations implementing § 503, the Department of Labor has provided that "a handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." 41 C.F.R. § 60-741.2 (1980).

The number of individuals protected by Title V of the Rehabilitation Act greatly exceeds the number of individuals who presently possess a physical or mental handicap. Clauses (ii) and (iii) of 29 U.S.C. § 706(7)(B) protect individuals who are no longer handicapped, although they were handicapped in the past, and individuals who are perceived as being handicapped, even though in fact they are not handicapped. This point is illustrated in Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977). The plaintiff sought employment as a policeman with the City of Tampa but was rejected because of a history of childhood epilepsy. *Id.* at 76. The City's policy was to exclude from consideration all individuals with a history of epilepsy. The plaintiff introduced unrebutted medical evidence that "he had outgrown [his childhood epilepsy] and was at present perfectly able to serve from a medical perspective as a policeman." *Id.* Although the district court denied the plaintiff's motion for a preliminary injunction because no irreparable harm was threatened, *id.* at 79, it subsequently found that the City had violated the plaintiff's rights under the Rehabilitation Act. Duran v. City of Tampa, 451 F. Supp. 954, 955 (M.D. Fla. 1978).

with the federal government for amounts in excess of $2,500.[5]

The question whether a private cause of action can be implied under section 503 has been raised in more than twenty cases. The leading case on this point is *Rogers v. Frito-Lay, Inc.*,[6] in which the Fifth Circuit refused to imply a cause of action. All of the other four circuit courts of appeals[7] and a substantial majority of the district courts[8] that

5. A person or firm becomes a federal contractor and subject to the strictures of § 503 when it enters into a contract or subcontract for an amount in excess of $2,500 with "any Federal department or agency for the procurement of personal property and nonpersonal services (including construction)." 29 U.S.C. § 793(a) (Supp. III 1979).

6. 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

7. Fisher v. City of Tucson, 663 F.2d 861, 867 (9th Cir. 1981); Davis v. United Air Lines, 662 F.2d 120, 127 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1244 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1084 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979). Strong dissents were written in three of these cases. Fisher v. City of Tucson, 663 F.2d at 867, (Fletcher, J., concurring and dissenting); Davis v. United Air Lines, 662 F.2d at 127 (Kaufman, J., dissenting); Rogers v. Frito-Lay, Inc., 611 F.2d at 1085 (Goldberg, J., dissenting).

8. District courts have refused to imply a cause of action under § 503 in thirteen cases. Meyerson v. Arizona, 507 F. Supp. 859, 864 (D. Ariz. 1981); Reynolds v. Ross, 25 F.E.P. Cases (BNA) 462, 466-67 (N.D.N.Y. 1981); Simon v. St. Louis County, 23 F.E.P. Cases (BNA) 1315, 1321 (E.D. Mo. 1980); Elliston v. Ralston Purina Co., 23 Empl. Prac. Dec. (CCH) ¶ 31,079 (N.D. Ala. 1980); Moon v. Santa Fe Ry., 22 F.E.P. Cases (BNA) 1252, 1253 (D. Kan. 1980); Langman v. Western Elec. Co., 488 F. Supp. 680, 685-86 (S.D.N.Y. 1980); Coleman v. Noland Co., 21 F.E.P. Cases (BNA) 1248, 1249 (W.D. Va. 1980); Doss v. General Motors Corp., 478 F. Supp. 139, 141 (C.D. Ill. 1979); Miglets v. Erie Lackawanna Ry., 19 F.E.P. Cases (BNA) 379, 380 (N.D. Ohio 1979); Anderson v. Erie Lackawanna Ry., 468 F. Supp. 934, 940 (E.D. Ohio 1979); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 202-03 (N.D. Tex. 1977), *aff'd*, 611 F.2d 1074, 1085 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Moon v. Roadway Express, Inc., 439 F. Supp. 1308, 1310 (N.D. Ga. 1977), *aff'd sub nom.*, Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Wood v. Diamond State Tel. Co., 440 F. Supp. 1003, 1010 (D. Del. 1977).

A private cause of action has been implied under § 503 by six district courts. California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125, 131 (C.D. Cal. 1980); Clarke v. FELEC Servs., 489 F. Supp. 165, 169 (D. Alaska 1980); Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1173 (S.D.N.Y. 1980); Hart v. County of Alameda, 485 F. Supp. 66, 76 (N.D. Cal. 1979); Duran v. City of Tampa, 451 F. Supp. 954, 955 (M.D. Fla. 1978) (alternative holding); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 816 (E.D. Pa. 1977).

Confusion about the existence of a cause of action under section 503 clearly exists. In Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1173 (S.D.N.Y. 1980), for example, a private cause of action was implied under § 503 in January 1980 by a court in the Southern District of New York. Less than two months later, another court in the same district, without referring to the Chaplin decision, refused to imply a cause of action under § 503. Langman v. Western Elec. Co., 488 F. Supp. 680, 685-86 (S.D.N.Y. 1980).

The commentators are also divided on whether a cause of action can or should be implied under § 503. Some commentators have concluded that a private cause of action should be implied. Note, *Implied Rights of Action under the Rehabilitation Act of 1973*, 68 GEO. L.J. 1229, 1230 (1980) [hereinafter cited as *Implied Rights of Action*]; Note, *Private Rights of Action for Handicapped Persons under Section 503 of the Rehabilitation Act*, 13 VAL. U.L. REV. 453, 476-92 (1979). Other commentators have taken different positions. Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and*

have considered this question also have concluded that a private cause of action should not be implied under section 503. Virtually all of the cases involving section 503 take the position that the implication of a private cause of action under that statute depends on the application of the four-part test set forth by the Supreme Court in *Cort v. Ash*[9] for determining the propriety of implying a cause of action under any statute.[10]

This Article concerns the intersection of two evolving areas of the law: the rights of the handicapped under the Rehabilitation Act and the means by which those rights may be enforced, and the principles governing the implication of private rights of action. This Article uses the *Cort* criteria to analyze both the cases and the available legislative materials concerning section 503 to determine whether a cause of action should be implied under section 503. As only one reported decision has found that section 503 did not satisfy the fourth *Cort* factor,[11] only the first three *Cort* factors are analyzed in this Article. The Article

Analysis of the Major Issues, 7 U. BALT. L. REV. 183, 194-95 (1978) (implication of a private cause of action is doubtful); Wright, *Equal Treatment of the Handicapped by Federal Contractors*, 26 EMORY L.J. 65, 95-96 (1977) (private right of action should not be implied); Note, *Employment Rights of Handicapped Individuals: Statutory and Judicial Parameters*, 20 WM. & MARY L. REV. 291, 299 (1978) ("[E]fforts to enforce section 503 through private judicial means will most likely prove unsuccessful.").

9. 422 U.S. 66, 78 (1975). See note 27 & accompanying text *infra*.

10. *See, e.g.*, Fisher v. City of Tucson, 663 F.2d 861, 863 (9th Cir. 1981); Davis v. United Air Lines, 662 F.2d 120, 122 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1237-38 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1078 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

11. Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 203 (N.D. Tex. 1977), *aff'd on other grounds*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980). Although the Fifth Circuit affirmed the district court's dismissal of the § 503 suit, it expressly overruled the district court's determination that the fourth factor was not satisfied, concluding that protection of the rights of the handicapped is not a matter traditionally relegated to state law. Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1078 n.4 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

All the other courts that have considered the question have concluded that the fourth factor does not present an obstacle to the implication of a private cause of action under § 503. *See, e.g.*, Fisher v. City of Tucson, 663 F.2d 861, 867 (9th Cir. 1981) ("This area is clearly one of federal concern."); Davis v. United Air Lines, 662 F.2d 120, 127 (2d Cir. 1981) ("[I]t is plain enough that discrimination against the disabled has not been a matter traditionally relegated to state law."); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1238 n.23 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1078 n.4 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

In approximately half of the reported cases, the courts did not consider the fourth *Cort* factor, having concluded that a cause of action should not be implied because of the failure to satisfy one or more of the first three *Cort* factors. *See, e.g.*, Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979); Reynolds v. Ross, 25 F.E.P. Cases (BNA) 462, 465 (N.D.N.Y. 1981); Simon v. St. Louis County, 23 F.E.P. Cases (BNA) 1315, 1321 (E.D. Mo. 1980); Langman v. Western Elec. Co., 488 F. Supp. 680, 685 (S.D.N.Y. 1980).

concludes that a private right of action can and should be implied under section 503 despite the overwhelming weight of judicial authority to the contrary.

One of the principal goals of the Rehabilitation Act is the expansion of employment opportunities for the handicapped in both the public and private sectors.[12] The inclusion of this goal is appropriate because, as a practical matter, individuals precluded from employment because of their handicaps are effectively segregated from society.[13] Nevertheless, handicapped individuals appear to be the victims of significant employment discrimination.[14] It has been estimated that there are approximately twenty-eight million adults in the United States with

12. As originally enacted, the Rehabilitation Act contained a lengthy eleven-point congressional "Declaration of Purpose." Pub. L. No. 93-112, § 2, 87 Stat. 357 (1973) (repealed 1978). One of those express goals was to promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment. *Id.* In addition, the legislative history of the Rehabilitation Act stated that one of the purposes of the Act was "to ensure [that] any qualified handicapped individual shall be given full and fair consideration for employment by any contractor who seeks to contract with the Federal Government." S. REP. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2123. In 1978, the Rehabilitation Act was amended by the Rehabilitation, Comprehensive Services and Development Disabilities Act of 1978. Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified in scattered sections of 29 U.S.C. §§ 701-961 (Supp. III 1979)). The 1978 Amendments shortened the declaration of purpose to provide, in its entirety, that "[t]he purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. § 701 (Supp. III 1979).

Noting this modification, the Seventh Circuit concluded that it does not represent any significant change in Congress's intent to promote employment opportunities for the handicapped. Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1233 n.11 (7th Cir. 1980).

A further indication of its commitment to expanding employment opportunities of the handicapped is Congress's failure to repeal or weaken sections 501 and 503 of Title V of the Rehabilitation Act, 29 U.S.C. §§ 791, 793 (1976 & Supp. III 1979), the sections that expressly address employment of the handicapped by the federal government and federal contractors.

13. An analogous situation was presented during the consideration of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979), which generally prohibits employment discrimination on the basis of race, color, sex, religion, and national origin. During the course of the debate on that provision, the proponents of Title VII argued that blacks and other minority groups could not become part of the mainstream of American society as long as they were subject to employment discrimination: "Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?" 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey).

14. *See, e.g.*, S. REP. No. 316, 96th Cong., 1st Sess. (1979). That report, a study on the existence of employment discrimination against the disabled, concluded that during a single year "[t]he total loss of earnings suffered by working white male disabled workers due to labor market discrimination was estimated to be about $4.5 billion." *Id.* at 5 (footnote omitted).

physical or mental handicaps.[15] It has been asserted that from seven to fourteen million of these individuals are employable[16] but that only 800,000 of them are in fact employed.[17]

Section 503 requires that each contract entered into by a federal department or agency with a federal contractor for an amount in excess of $2,500 contain a clause requiring the contractor to "take affirmative action to employ and advance in employment qualified handicapped individuals."[18] It has been estimated that the federal contractors subject to section 503 employ more than one-third of the American work force.[19] Although the affirmative action clause is in the form of a contractual provision, in effect it is a non-negotiable obligation imposed upon federal contractors subject to section 503.[20] The affirmative action obligation of a federal contractor, however, extends only to handicapped individuals who are qualified to perform the job in spite of their handicaps.[21] Although section 503(b) expressly creates an administrative remedy for the handicapped,[22] the Rehabilitation Act is silent with respect to whether a handicapped individual may maintain a private suit against a federal contractor that has allegedly violated its affirmative action obligations. For millions of unemployed handicapped individuals, the question whether a private cause of action can be implied under section 503 has tremendous practical significance. If their only remedy is the express administrative remedy provided in section 503(b), then the value of the statutory rights created in favor of handi-

15. The Senate Committee on Labor and Public Welfare noted estimates that there are between 28 and 50 million Americans with physical or mental handicaps. S. REP. No. 1297, 93d Cong., 2d Sess. 34, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6400.

16. 118 CONG. REC. 3321 (1972) (remarks of Sen. Williams); *see also Hearings on H.R. 8395 Before the Subcomm. on the Handicapped*, 92d Cong., 2d Sess. 265 (1972).

17. 118 CONG. REC. 3321 (1972) (remarks of Sen. Williams); *see also* S. REP. No. 319, 93d Cong., 1st Sess. 8 (1973).

18. 29 U.S.C. § 793(a) (Supp. III 1979).

19. *Lowering Barriers: Pressured Companies Decide that Disabled Can Handle More Jobs*, Wall St. J., Jan. 27, 1976, at 1, col. 1. One federal agency has estimated that § 503 prohibits employment discrimination by approximately 300,000 federal contractors and subcontractors. *See* S. REP. No. 316, 96th Cong., 1st Sess. 3 (1979).

20. Department of Labor regulations provide that the affirmative action clause "shall be considered a part of every contract . . . required by the [Rehabilitation] Act . . . whether or not it is physically incorporated in such contracts and whether or not there is a written contract between the agency and the contractor." 41 C.F.R. § 60-741.23 (1980).

21. Section 503(a) imposes an obligation on federal contractors only with respect to "qualified handicapped individuals." 29 U.S.C. § 793(a) (Supp. III 1979). The Department of Labor has defined a "qualified handicapped individual" as "a handicapped individual . . . who is capable of performing a particular job, with reasonable accommodation to his or her handicap." 41 C.F.R. § 60-741.2 (1980).

22. 29 U.S.C. § 793(b) (1976). See note 66 *infra*.

capped individuals depends entirely on the ability of the Department of Labor (DOL) to dispose of administrative complaints promptly and efficiently.[23] The DOL has taken the position that it lacks the enforcement resources necessary to investigate and resolve expeditiously the growing backlog of administrative complaints filed under section 503.[24]

Cort v. Ash

In *Cort v. Ash*,[25] the Supreme Court articulated a four-part test that provides the analytical framework for determining the propriety of the implication of a private cause of action under a statute that does not expressly authorize such a remedy. *Cort* involved a derivative lawsuit by a stockholder against corporate directors alleging a violation of the criminal statute, 18 U.S.C. section 610,[26] which has since been repealed, that prohibited corporate contributions or expenditures in connection with federal elections. Although section 610 provided only criminal sanctions, the plaintiff sought damages predicated upon an implied private cause of action. In *Cort*, the Supreme Court unanimously rejected the attempt to imply a cause of action, stating:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[27]

23. There are other methods by which § 503 could be enforced. Congress could obviate the need for an implied cause of action by granting an express cause of action for the violation of § 503. A possible legal strategy for redressing violations of § 503 is a suit brought by a handicapped individual against a federal contractor as a third-party beneficiary of the contract between the government and the federal contractor. In a case refusing to imply a cause of action under § 503, the court expressly noted that it was not passing upon the merits of a suit predicated upon a third-party beneficiary theory. Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1079 n.5 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980). For additional legal strategies for enforcing § 503, see Note, *Private Rights of Action for Handicapped Persons under Section 503 of the Rehabilitation Act*, 13 VAL. U.L. REV. 453 (1979).

24. Although the DOL initially took the position that a cause of action should be implied under § 503, it has altered its stance. See notes 278-98 & accompanying text *infra*.

25. 422 U.S. 66 (1975).

26. Act of June 25, 1948, ch. 645, § 610, 62 Stat. 683, 723 (repealed 1976).

27. 422 U.S. at 78 (citations omitted) (emphasis in original).

Cort therefore may be construed as requiring the satisfaction of all of the four tests for a cause of action to be implied.

The Supreme Court concluded that none of the four tests favored implication under section 610.[28] With respect to the first factor, the Court determined that Congress's motivations in enacting section 610 were "the necessity for destroying the influence over elections which corporations exercised through financial contributions and the feeling that corporate officials had no moral right to use corporate funds for contributions to political parties without the consent of the stockholders."[29] The Court concluded, however, that the legislative history of section 610 "demonstrates that the protection of ordinary stockholders was at best a secondary concern."[30] Accordingly, the plaintiff-stockholder in *Cort* was not one for whose "especial" benefit section 610 was enacted. The Court concluded that the second test was not satisfied because nothing in the legislative history of the statute manifested a congressional intent to create a private remedy, and it was "at least dubious" that Congress intended to confer special rights on corporate shareholders.[31] In addition, the third of the four tests was not satisfied because the implication of a private cause of action "would not aid the primary congressional goal."[32] Finally, the fourth factor was not satisfied because it was "entirely appropriate" to relegate derivative lawsuits against corporate directors to state law.[33]

The First Cort Test

> [I]s the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff?[34]

The Supreme Court has referred to this first test as the "threshold question"; unless a court first determines that the relevant "statute was enacted for the benefit of a special class of which the plaintiff is a member," consideration of the other three factors is unnecessary.[35] Several courts considering actions brought under section 503 have concluded

28. *Id.* at 80-85.
29. *Id.* at 80 (quoting United States v. CIO, 335 U.S. 106, 113 (1948)).
30. *Id.* at 81.
31. *Id.* at 82-83.
32. *Id.* at 84.
33. *Id.* at 84-85.
34. *Id.* at 78 (emphasis in original).
35. Cannon v. University of Chicago, 441 U.S. 677, 689 (1979). One commentator has asserted that fulfillment of this criterion is dispositive in favor of the implication of a private right of action. Seng, *Private Rights of Action*, 27 DE PAUL L. REV. 1117, 1123 n.30 (1978). This position is no longer tenable in light of Transamerica Mortgage Advisors v. Lewis, 444

that the first *Cort* test was satisfied.[36] Other courts, however, although assuming that the first test was satisfied for the purpose of deciding a motion to dismiss, have suggested that the absence of "right-creating phrases" in section 503 has made the implication of private causes of action more difficult.[37]

The Fifth Circuit examined the first *Cort* factor in 1980 in *Rogers v. Frito-Lay, Inc.*,[38] seeking to determine whether section 503 conferred a clearly defined "federal right" on the handicapped.[39] *Rogers* involved a consolidated appeal from two judgments dismissing suits predicated upon an implied cause of action under section 503.[40] The court upheld the dismissals by both district courts. The majority indicated that satisfaction of the first *Cort* test turns on two factors. First, the statute must identify a particular class of persons of which the plaintiff is a member. Second, the court must determine whether Congress intended to create a federal right in favor of the plaintiff.[41] The *Rogers* majority recognized that section 503 identified the handicapped as the relevant class and that, at least for the purpose of their appeals, the plaintiffs in both of the district court decisions were within the relevant class.

Although the *Rogers* court stopped short of concluding that the first *Cort* test was not satisfied, it suggested that implication of a cause of action under section 503 was "more difficult" because the statute did not "clearly define a right inhering in individual members of a benefitted class."[42] The Second Circuit, in *Davis v. United Air Lines*,[43] and the Seventh Circuit, in *Simpson v. Reynolds Metals Co.*,[44] have followed

U.S. 11 (1979), in which the Supreme Court declined to imply a cause of action despite satisfaction of the first *Cort* test. *Id.* at 19-24.

36. *See* Fisher v. City of Tucson, 663 F.2d 861, 863-64 (9th Cir. 1981); California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125, 128-29 (C.D. Cal. 1980); Simon v. St. Louis County, 23 F.E.P. Cases (BNA) 1315, 1317-19 (E.D. Mo. 1980); Clarke v. FELEC Servs., 489 F. Supp. 165, 167 (D. Alaska 1980); Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1168 (S.D.N.Y. 1980); Coleman v. Noland Co., 21 F.E.P. Cases (BNA) 1248, 1249 (W.D. Va. 1980); Hart v. County of Alameda, 485 F. Supp. 66, 68 (N.D. Cal. 1979); Duran v. City of Tampa, 451 F. Supp. 954, 955-56 (M.D. Fla. 1978) (by implication); Drennon v. Philadelphia Gen. Hosp., 428 F. Supp. 809, 815-16 (E.D. Pa. 1977).

37. *See, e.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1239-40 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

38. 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

39. *Id.* at 1079-80.

40. Moon v. Roadway Express, Inc., 439 F. Supp. 1308 (N.D. Ga. 1977); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977).

41. 611 F.2d at 1079.

42. *Id.* at 1080.

43. 662 F.2d 120 (2d Cir. 1981).

44. 629 F.2d 1226 (7th Cir. 1980).

Rogers in concluding that section 503 may not satisfy the first *Cort* test.[45]

The Supreme Court stated in a footnote in *Cannon v. University of Chicago*[46] that "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."[47] Although *Rogers*, *Davis*, and *Simpson* all relied on this statement, neither they nor *Cannon* mandated the use of any prescribed "right- or duty-creating" language. At most, they suggested that the presence of such language made the implication of a private right of action more probable.[48]

Moreover, *Cannon* suggests that certain language may be functionally equivalent to use of the word "right." In that case the Supreme Court observed that "this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case."[49] In support, the Court quoted the statutory language from eight cases in which it had implied a cause of action.[50] Of these eight examples of what the *Cannon* Court stated were explicit statutory conferrals of a right, only five statutes contained the word "right." The other three merely used imperative language, which the court treated as equivalent.[51]

For example, in *Virginian Railway v. System Federation No. 40*,[52] the statute in question stated that "the carrier shall treat with the *representative* so certified . . . ."[53] The Court emphasized the word "representative" because that term identified the class involved. The obligation imposed is found in the words "the carrier shall treat with," a phrase that places upon the carrier the duty to bargain with the employee's representative. Accordingly, the Supreme Court concluded that a right of action could be implied under the statute.

Similarly, in *Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks*[54] and in *Texas & Pacific Railway v.*

45. *See* 662 F.2d at 122-23; 629 F.2d at 1239-40.
46. 441 U.S. 677 (1979).
47. *Id.* at 690 n.13.
48. Davis v. United Airlines, Inc., 662 F.2d 120, 123 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1240 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).
49. 441 U.S. at 690 n.13.
50. *Id.* at 690-91 n.13.
51. *Id.*
52. 300 U.S. 515 (1937).
53. *Id.* at 544 (emphasis added by the Court).
54. 281 U.S. 548 (1930). The statute at issue provided that "representatives . . . shall

Rigsby,[55] the Court implied private causes of action from statutes that did not include the word "right" in describing the class of persons protected or the benefit conferred upon them. These three cases make it clear that a statute can create a federal right in favor of a particular class without employing the word "right."[56] The common denominator in all three cases appears to be the identification of the relevant class and, as indicated by the word "shall," the imposition of some duty upon another party.

By citing these three cases in *Cannon*, the Supreme Court has adopted an interpretation of an explicit statutory conferral of a right broad enough to include section 503. That section provides, in part, that "the party contracting with the United States shall take affirmative action to employ . . . qualified handicapped individuals . . . ."[57] As in the three cases cited in *Cannon*, section 503 identifies the relevant class—qualified handicapped individuals—and mandates that employers fulfill a duty—the duty to take affirmative action. It can be maintained, therefore, that this language "explicitly" confers a right on handicapped individuals under the *Cannon* approach. Accordingly, even if, as *Cannon* suggests, "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action,"[58] section 503 meets that test.

The Supreme Court's "right- or duty-creating language" analysis, as articulated in *Cannon*, is so broad that a seemingly endless number of statutes would appear to confer a federal right on one class or another in satisfaction of the first of the four *Cort* tests. Accordingly, it would not be surprising if the Supreme Court retreated from the posi-

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be designated by the respective parties . . . without interference, influence, or coercion exercised by either party . . . ." *Id.* at 567.

55. 241 U.S. 33 (1916). The Court implied a duty and a cause of action in favor of "any employee of any such common carrier." *Id.* at 40. The language from the *Rigsby* opinion which is quoted in *Cannon* is not accurate but the inaccuracy is immaterial. *Id.*

56. The most recent of the three decisions was rendered in 1930, and, as the Supreme Court expressly indicated in *Cannon*, not until 1972 did the Court become much more restrictive in the implication of private causes of action: "[D]uring the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently implied remedies—often in cases much less clear than this. It was *after* 1972 [that is, after the enactment of Title IX] that this Court decided *Cort v. Ash* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute." 441 U.S. at 698 (emphasis in original) (footnotes omitted). In light of its decision in Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), it can be argued that the Court has become even more restrictive in implying private rights of action than was suggested in *Cannon*. See notes 185-93 & accompanying text *infra*.

57. 29 U.S.C. § 793(a) (Supp. III 1979).

58. 441 U.S. 677, 690 n.13 (1979).

tion that a statute "explicitly" confers a federal right on a class simply by identifying a particular class and using the word "shall," followed by some statutorily imposed duty.

Rogers advances three additional arguments in support of its position that the language of section 503 makes the implication of a cause of action difficult because it fails to "create a federal right in favor of the [handicapped] plaintiff."[59] Each argument merits individual analysis.

A Duty Is Directly Imposed Only Upon Federal Departments and Agencies

The *Rogers* court stated that the language of section 503 "merely requires those who give out federal contracts to obligate contractors to take affirmative steps to employ and advance handicapped persons. The duty it *directly* creates is imposed upon federal departments and agencies, not upon contractors."[60] This assertion ignores the express language of section 503, which requires that contracts with federal contractors "shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States *shall take affirmative action* to employ and advance in employment qualified handicapped individuals . . . ."[61] The language quoted indicates that there are two "shall" or duty-imposing provisions in section 503: first, the contract shall contain an affirmative action provision; and second, the party contracting with the United States shall, because of its contractual obligations, take affirmative action. The *Rogers* opinion emphasizes the former while virtually ignoring the existence of the latter.

Although the *Rogers* court implicitly recognized that section 503 imposes some obligation on federal contractors, it suggested that that obligation is only an indirect one. The court implied that, in contrast, the duty imposed on federal agencies is a significant "direct" one. This distinction, however, elevates form over substance. In enacting section 503, Congress's purpose was not to lengthen federal contracts or to increase the responsibilities of government agencies. Rather, Congress sought to benefit handicapped individuals by increasing the employment opportunities open to them,[62] and elected to accomplish this goal by imposing on federal contractors the obligation to take affirmative action to employ and to advance in employment qualified handicapped

59. 611 F.2d 1074, 1079-80 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).
60. *Id.* at 1079 (emphasis added).
61. 29 U.S.C. § 793(a) (Supp. III 1979) (emphasis added).
62. See note 12 & accompanying text *supra*.

individuals. Accordingly, the substance of section 503 is the imposition of obligations on federal contractors, and not on agencies. The ministerial, almost trivial, nature of the agencies' "direct" obligation to ensure that the affirmative action clause is inserted in federal contracts is demonstrated by the fact that the regulations promulgated by the DOL to implement section 503 make the affirmative action clause binding on a contractor whether or not it is physically incorporated in the contract.[63]

Moreover, the regulations implementing section 503 indicate that the DOL construes the section to impose an obligation on federal contractors. One of these regulations provides that "[u]nder the affirmative action obligation imposed by section 503 of the Rehabilitation Act of 1973, contractors are required to take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment . . . ."[64] The DOL's construction of that statute is entitled to considerable deference because it is the government agency charged with enforcing section 503.[65]

Section 503(b) expressly grants an administrative remedy if a handicapped individual files a complaint with the DOL against any contractor.[66] The provision for an administrative remedy does not, by itself, prove that Congress intended to create an implied private cause of action. The creation of this federal administrative remedy against the contractor, however, does presuppose that Congress intended both to confer a "federal right" on the handicapped and to provide a means for redressing a violation of that federal right.[67]

The Rehabilitation Act was amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978 (1978

63. See note 20 & accompanying text *supra*.

64. 41 C.F.R. § 60-741.6(a) (1980).

65. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnote omitted); *see also* Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 251 (1978); Zemel v. Rusk, 381 U.S. 1, 11-12 (1965); Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

66. "If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant . . . ." 29 U.S.C. § 793(b) (1976). DOL regulations set forth the procedure to be followed upon receipt of a complaint from a handicapped individual. 41 C.F.R. §§ 60-741.26 to .32 (1980).

67. The ultimate question, of course, is whether Congress intended this federal right to be remedied by private lawsuit. The first *Cort* test, however, inquires only into the existence of that federal right. See notes 34-59 & accompanying text *supra*.

amendments).[68] Those amendments added section 505(b), which provides for the award of attorneys' fees to "the prevailing party, other than the United States," in "any action or proceeding to enforce or charge a violation of a provision of this title [which includes section 503]."[69] By providing for an award of attorneys' fees to either successful party, except the United States, the statute clearly contemplates that the contractor could be a party defendant in a private action to enforce section 503. Furthermore, section 505(b) presupposes the existence of a federal right in favor of the handicapped, and, conversely, the imposition of a duty on federal contractors. It would be anomalous to speak of "an action . . . to enforce or charge a violation" of section 503, if section 503 did not confer rights on the handicapped that might be violated. As a matter of logic, a federal contractor cannot violate a nonexistent duty. Therefore, the enactment of section 505(b) demonstrates that Congress believed, at the time it enacted the 1978 amendments, that it had previously imposed an obligation on federal contractors under section 503.

In light of the foregoing, the assertion in *Rogers* that section 503 imposes a "direct" duty "merely" on federal agencies and not on federal contractors is untenable.

No Clearly Defined Right Conferred on the Handicapped

The *Rogers* court contended that section 503 "does not confer a clearly defined right on the benefitted class."[70] The court, however, apparently failed to perceive that the phrase "affirmative action" is a term of art that includes the obligation not to discriminate. The duty not to discriminate has been recognized as giving rise to a clearly defined right.[71] Congress has enacted statutes that prohibit employment discrimination based on factors such as sex, race, and national origin.[72] There can be little doubt that these antidiscrimination statutes confer a clearly defined right on the protected classes. Similarly, if Congress had substituted in section 503 the phrase "shall not discriminate in em-

68. Pub. L. No. 95-602, 92 Stat. 2955 (1978). The Rehabilitation Act had also been amended in 1974. See note 78 & accompanying text *infra*.

69. 29 U.S.C. § 794a(b) (Supp. III 1979). The legislative history of the 1978 amendments indicates that the award of attorneys' fees would be permitted in suits predicated upon § 503. See notes 226-68 & accompanying text *infra*.

70. 611 F.2d at 1079.

71. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

72. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

ployment against" for the phrase "shall take affirmative action to employ," the handicapped would have a clearly defined right to be protected from discrimination as that phrase is used in *Rogers*.

The right to be free from handicapped-based discrimination is incorporated in section 503's broader mandate of affirmative action. Prior to the enactment of the Rehabilitation Act, the term "affirmative action" had been construed by both the Seventh Circuit and the Attorney General, in another civil rights context, to impose "more than the merely negative obligation not to discriminate."[73] Moreover, the legislative history of the Rehabilitation Act suggests that Congress did intend section 503 to prohibit discrimination. In that history there is a Senate Report on a bill that, although not ultimately enacted, contained a provision identical to section 503 as enacted. The report stated that one purpose of that provision was to provide a remedy for the handicapped individual "who has a discrimination complaint against [a] Federal contractor."[74]

In addition, the DOL has construed section 503 to prohibit discrimination. In its regulations implementing section 503, the DOL promulgated an affirmative action clause for insertion into federal contracts that provides that "the contractor will not discriminate" and that it further "agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices . . . ."[75] As the DOL is the agency charged with enforcing section 503, its construction of that statute is entitled to great deference.[76] In *Rogers*, the Fifth Circuit acknowledged that "the affirmative action clause inserted in federal contracts pursuant to [section 503] bans discrimination on the basis of handicaps."[77] If it is assumed, *arguendo*, that the "affirmative action" obligation of a federal contractor does not encompass the obligation not to discriminate, then the DOL would have exceeded its authority by promulgating its regulations in their present form. This argument, however, is absent from

73. 42 Op. Att'y Gen. 405 (1969); *accord* Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680, 684 (7th Cir. 1972) (interpreting Exec. Order No. 11,246, § 202, 3 C.F.R. 169, 170 (1974), which obligates federal contractors to take affirmative action "to ensure that applicants are employed . . . without regard to their race, color, religion, sex, or national origin"). This duty to take affirmative action toward the handicapped implicitly includes the duty not to discriminate against them.

74. S. REP. NO. 318, 93d Cong., 1st Sess. 50, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2123.

75. 41 C.F.R. § 60-741.4 (1980).

76. See note 65 & accompanying text *supra*.

77. 611 F.2d at 1079 n.5.

any reported case involving section 503, including *Rogers*. This suggests that there is tacit agreement that the DOL's regulations do not exceed its authority.

Finally, the legislative history of the Rehabilitation Act Amendments of 1974 (1974 amendments)[78] provides additional support for the conclusion that Congress intended the affirmative action obligation to impose a duty not to discriminate and thus did confer a clearly defined right on the benefited class. The Senate Report on the 1974 amendments stated that Congress's intent was "that sections 503 and 504 be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against the handicapped persons would result."[79] Furthermore, the report stated that a new definition of handicapped individual "has been developed which would provide sufficient latitude . . . particularly for the nondiscrimination programs carried out under sections 501, 503, and 504 with respect to the employment of handicapped individuals . . . under Federal contracts . . . ."[80]

In light of the overwhelming support for the position that section 503 prohibits, at an absolute minimum, handicapped-based discrimination, the assertion by the Fifth Circuit in *Rogers* that section 503 fails to confer a "clearly defined right" on the handicapped cannot be supported. The handicapped do have a right under section 503: the clearly defined right to be free from discrimination predicated upon their handicaps.

No Right of Affirmative Action in Every Case

The third argument of the *Rogers* court is that section 503 does not intimate "that every qualified handicapped person has a right to affirmative action in his particular case."[81] This argument, reiterated by the Seventh Circuit in *Simpson*,[82] is a product of confusion concerning the term of art "affirmative action." A hypothetical is useful in clarifying the confusion.

Assume that an employer has one hundred jobs available. Assume further that three hundred qualified nonhandicapped and one hundred qualified handicapped individuals apply for those positions. Must the employer hire all one hundred of the qualified handicapped individuals

78. Pub. L. No. 93-516, 88 Stat. 1617 (1974).

79. S. REP. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391.

80. *Id.* at 63, 1974 U.S. CODE CONG. & AD. NEWS at 6413.

81. 611 F.2d at 109.

82. 629 F.2d at 1240.

and none of the qualified nonhandicapped individuals? It is possible that the *Rogers* and *Simpson* courts have incorrectly concluded that if the phrase "affirmative action" were construed to impose a clearly defined duty, the answer to the question would have to be yes. Accordingly, *Rogers* and *Simpson* conclude that not "every qualified handicapped person has a right to affirmative action in his particular case,"[83] by which the courts appear to mean that not every qualified handicapped person has a right to one of the available jobs. The courts' conclusion is correct, but their reasoning is faulty. "Affirmative action" does not require that all of the qualified handicapped individuals be hired to the exclusion of the nonhandicapped; it does require, at a minimum, that no qualified handicapped individual be denied employment because of his or her handicap.[84]

In summary, section 503 does clearly confer a federal right on handicapped individuals. Accordingly, the first of the *Cort* tests is satisfied.

The Second Cort Test

> [I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?[85]

The satisfaction of the second *Cort* test is the most formidable obstacle to the implication of a cause of action under section 503. The determination of "legislative intent" is especially difficult because it requires the resolution of a number of interrelated legal issues in an unsettled area of the law.

Until recently, the Supreme Court used an analytical approach that had the practical effect of minimizing the significance of the second *Cort* factor. In 1979, in *Transamerica Mortgage Advisors v. Lewis*,[86] however, the Supreme Court emphasized the importance of congressional intent in implying a private cause of action.[87] Furthermore, the Court indicated that the phrase "legislative intent" required

83. 611 F.2d at 109.

84. Delineating the precise boundaries of what is permissible or required by the term of art "affirmative action" in § 503 will, no doubt, be an arduous and protracted process. *Cf.* United Steelworkers v. Weber, 443 U.S. 193, 201-04 (1979) (private, voluntary race-conscious "affirmative action" plan does not necessarily violate Title VII's prohibition on racial discrimination).

85. 422 U.S. at 78.

86. 444 U.S. 11 (1979).

87. "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. . . . [W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted . . . ." *Id.* at 15-16 (citations omitted).

not merely an intent to confer a special benefit on a particular class, but also an intent to make the right conferred enforceable through private lawsuits.[88]

The inquiry into legislative intent begins with an examination of the language of the relevant statute.[89] The language of section 503 of the Rehabilitation Act does not suggest that Congress contemplated a private remedy. In addition, the contemporaneous legislative history of the Rehabilitation Act is silent with respect to the availability of a private right of action under section 503.[90]

Section 503(b), however, does contain an express administrative remedy that can be initiated by a handicapped individual who believes that a federal contractor has failed to comply with its affirmative action obligations.[91] There is nothing in the legislative history of section 503 to support the conclusion that this express remedy was intended to be the exclusive remedy for violations of section 503. The availability of this remedy, however, has led many courts to apply the principle of *expressio unius est exclusio alterius*, which states that "the expression of one thing is the exclusion of another,"[92] in refusing to imply a private cause of action under section 503.[93] In fact, reliance upon the principle of *expressio unius* appears to be the most significant justification for the refusal of courts to imply a private remedy under section 503. Thus, a crucial issue in the implication of a cause of action under section 503 is the propriety of using *expressio unius* when there is no other indication that Congress intended the express remedy to be the exclusive remedy.[94]

The Rehabilitation Act was amended in 1974[95] and 1978.[96] Several

88. "[The Investment Advisers] Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations [on investment advisers] . . . . But whether Congress intended additionally that these provisions would be enforced through private litigation is a different question." *Id.* at 17-18 (citations omitted).

89. *See id.* at 16; Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Cannon v. University of Chicago, 441 U.S. 677, 689 (1979).

90. *See* Simpson v. Reynolds Metals Co., 629 F.2d at 1240.

91. 29 U.S.C. § 793(b) (1976).

92. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

93. *See, e.g.*, Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1084-85 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Meyerson v. Arizona, 507 F. Supp. 859, 861 (D. Ariz. 1981); Simon v. St. Louis County, 23 F.E.P. Cases (BNA) 1315, 1321 (E.D. Mo. 1980); Coleman v. Noland Co., 21 F.E.P. Cases (BNA) 1248, 1249 (W.D. Va. 1980); Langman v. Western Elec. Co., 488 F. Supp. 680, 685 (S.D.N.Y. 1980); Anderson v. Erie Lackawanna Ry., 468 F. Supp. 934, 937 (E.D. Ohio 1979). The only § 503 case to reject an *expressio unius* argument is Hart v. County of Alameda, 485 F. Supp. 66, 74 n.10 (N.D. Cal. 1979).

94. See notes 101-93 & accompanying text *infra*.

95. See note 78 & accompanying text *supra*.

district courts have taken the position that the legislative histories of the 1974 and 1978 amendments demonstrate that Congress intended a private cause of action to exist under section 503.[97] Most courts, however, have rejected these arguments.[98] The attempts to rely upon the 1974 and 1978 amendments as indications of Congress's intent in enacting section 503 raise two issues: first, whether the subsequent legislative history of a statute can be used in the construction of the original statute;[99] second, whether the 1974 and 1978 amendments shed light on Congress's intention in enacting section 503.[100]

Expressio Unius and a Silent Legislative History

There is no contemporaneous legislative history for section 503. Assuming, *arguendo*, that the 1974 and 1978 amendments cannot be considered in construing section 503 because they constitute subsequent legislative history, then it is necessary to discern Congress's intent from a silent legislative history. The issue then becomes whether a cause of action can be implied when the legislative history of the relevant statute is silent and the statute provides an express remedy.

In *Cort*, the Supreme Court limited the significance of a silent legislative history: unless the history evinces a clear intent to deny a private remedy, a silent legislative history does not preclude the implication of a private cause of action if a right has been clearly conferred upon a class to which the plaintiff belongs.[101]

Cort involved a civil suit for damages and other relief for violation of 18 U.S.C. § 610, which prohibited corporations from making expenditures in connection with certain specified federal elections.[102] The shareholders' derivative suit was based upon an implied cause of action because section 610 was a criminal statute, which did not pro-

96. See note 68 & accompanying text *supra*.

97. *See* California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125, 129-30 (C.D. Cal. 1980); Clarke v. FELEC Servs., 489 F. Supp. 165, 168-69 (D. Alaska 1980); Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1170-71 (S.D.N.Y. 1980); Hart v. County of Alameda, 485 F. Supp. 66, 73-74 (N.D. Cal. 1979).

98. *See, e.g.*, Fisher v. City of Tucson, 663 F.2d 861, 865-66 (9th Cir. 1981); Davis v. United Air Lines, 662 F.2d 120, 123-26 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1241-43 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1081-83 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Meyerson v. Arizona, 507 F. Supp. 859, 861-62 (D. Ariz. 1981); Langman v. Western Elec. Co., 488 F. Supp. 680, 685-86 (S.D.N.Y. 1980); Anderson v. Erie Lackawanna Ry., 468 F. Supp. 934, 936-38 (E.D. Ohio 1979).

99. See notes 194-207 & accompanying text *infra*.

100. See notes 208-68 & accompanying text *infra*.

101. 422 U.S. at 82.

102. *See id.* at 68-70.

vide any express authority for a private remedy. The Supreme Court concluded that the legislative history of section 610 was silent with respect to whether Congress intended "to vest in corporate shareholders a federal right to damages for violation of § 610."[103] Accordingly, the Court was faced with a factual situation similar to the one presented by section 503: it was required to determine "legislative intent" from a legislative history that was silent on this point. In dictum, the Court maintained that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."[104] Thus, under *Cort*, if the plaintiff establishes that federal rights are clearly conferred on a particular class, and the third and fourth *Cort* factors are satisfied, a private remedy may be implied, unless the defendant establishes that the legislative history of the statute demonstrates an "explicit purpose" to deny a private cause of action. The plaintiff need not demonstrate a congressional intent to provide a private remedy. In *Cort*, however, the third and fourth factors were not satisfied, and the Court found that creation of a federal right in favor of shareholders was "at best a subsidiary purpose of § 610."[105] The Court acknowledged that it could normally expect few insights from a legislative history when the statute itself was silent.

In *Cannon*, the plaintiff sought to imply a private right of action under section 901 of Title IX of the Education Amendments of 1972.[106] The Supreme Court concluded that there was ample contemporaneous and subsequent legislative history to demonstrate Congress's intent to create a private remedy under section 901.[107] In dictum, however, the Court suggested that the second *Cort* test would rarely be helpful in ascertaining legislative intent, stating that "the legislative history of a

103. *Id.* at 82.

104. *Id.* (emphasis in original) (footnote omitted).

105. *Id.* at 80. The Court's refusal to imply a private cause of action does not appear to be based on the fact that the legislative history was silent. The Court stated: "Where as here, it is at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided by state regulation of corporations, the fact that there is no suggestion at all that § 610 may give rise to a suit for damages or, indeed, to any civil cause of action, reinforces the conclusion that the expectation, if any, was that the relationship between corporations and their stockholders would continue to be entrusted entirely to state law." *Id.* at 82-84 (footnote omitted). Section 503 is distinguishable from the statute at issue in *Cort*, however, because it is clear that Congress intended to grant the handicapped a federal right. See notes 35-84 & accompanying text *supra*.

106. 20 U.S.C. § 1681 (1976).

107. 441 U.S. at 694-703.

statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question [of legislative intent]."[108]

The combined effect of the *Cort* and *Cannon* decisions is to assign relatively little weight to the second *Cort* test. There can be little disagreement with *Cannon*'s prediction that statutes that are silent concerning private causes of action typically will be supported by silent legislative histories.[109] It is unlikely that many difficult cases concerning the implication of causes of action would arise if the legislative histories of the relevant statutes were explicit about the availability or nonavailability of private lawsuits. Moreover, the *Cort* and *Cannon* courts did not view the lack of a clear congressional intention either to create or to deny a private remedy to be a significant obstacle to the implication of a cause of action.

Expressio Unius in Transamerica Mortgage Advisors v. Lewis and Touche Ross & Co. v. Redington

In two post-*Cannon* cases, *Transamerica Mortgage Advisors v. Lewis*[110] and *Touche Ross & Co. v. Redington*,[111] the Supreme Court appears to have shifted its emphasis. The *Transamerica* Court relied upon the maxim of *expressio unius est exclusio alterius* together with the silent legislative history to reject an implied cause of action.[112] The *Touche Ross* Court appeared to exhibit a limited reliance on *expressio unius*.[113] These applications of *expressio unius* appear to contrast sharply with the Court's rejection, in *Cort*, of the use of that principle in the absence of supporting legislative history.[114] Furthermore, *Transamerica* ascribed much more significance to the second *Cort* factor than did either *Cort* or *Cannon*.

Touche Ross involved the question whether a cause of action could be implied under section 17(a) of the Securities Exchange Act of 1934 (1934 Act),[115] which requires registered broker-dealers to file certified

108. *Id.* at 694.

109. Although the majority opinion in Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979), was hostile to implication, it agreed that the legislative history of a statute at issue in an implication case would typically be silent. *See id.* at 18.

110. 444 U.S. 11 (1979).

111. 442 U.S. 560 (1979).

112. 444 U.S. at 19-21.

113. 442 U.S. at 571-72.

114. 422 U.S. at 82 n.14. For a discussion of *Cort*'s rejection of *expressio unius*, see notes 158-60 & accompanying text *infra*.

115. 15 U.S.C. 78q(a) (1976). Section 17 provides, in part, that "[e]very national securities exchange, member thereof, broker or dealer who transacts a business in securities

financial statements with the Securities Exchange Commission (SEC). The suit was brought on behalf of the customers of an insolvent broker-dealer against the accounting firm that had prepared the allegedly inaccurate financial statements.[116] The Second Circuit had found an implied cause of action under section 17(a),[117] but the Supreme Court reversed the decision.[118]

Although the Supreme Court rested its conclusion in *Touche Ross* principally upon the failure of the statute to confer rights on private parties or to proscribe any conduct as unlawful,[119] language in the majority opinion appears to embrace the principle of *expressio unius*. Noting that "§ 17(a) is flanked by provisions of the 1934 Act that explicitly grant private causes of action," the Court stated that, "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."[120] Despite this apparent conflict, *Touche Ross* may be harmonized with *Cort*'s rejection of *expressio unius* in the absence of supporting legislative history.

First, in holding that the statute "grants no private rights to any identifiable class,"[121] the majority in *Touche Ross* necessarily concluded that the first *Cort* test was not satisfied. The failure to satisfy the first *Cort* test is, by itself, dispositive against implication. The outcome in *Touche Ross* was not determined by the Court's reference to *expressio unius*.

Second, although both the majority[122] and concurring[123] opinions in *Touche Ross* assert that the legislative history of the 1934 Act is silent with respect to the existence of a private remedy under section 17(a), this conclusion is dubious. It may be argued that the legislative history of section 18(a) of the 1934 Act,[124] which suggests that section 18(a) was intended to establish the exclusive remedy for misstatements con-

through the medium of any such member . . . shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the [Securities Exchange] Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors . . . ." *Id.*

116. 442 U.S. at 562. The plaintiffs sued on the theory that the misstatements in the financial statements prevented the SEC from taking timely action to prevent the broker's insolvency and the ensuing losses. *Id.* at 565-66.

117. Redington v. Touche Ross & Co., 592 F.2d 617 (2d Cir. 1978).

118. 442 U.S. at 567.

119. *Id.* at 569.

120. *Id.* at 571-72 (citations omitted).

121. *Id.* at 576.

122. *Id.* at 571.

123. *Id.* at 579-80 (Brennan, J., concurring).

124. 15 U.S.C. § 78r(a) (1976).

tained in reports filed with the SEC, demonstrated an explicit purpose to deny a cause of action under section 17(a).[125] Such a purpose would also mandate against finding an implied right of action. Thus, in *Touche Ross*, the legislative history of the 1934 Act supports the presumption of exclusivity, the principle on which *expressio unius* rests. As *expressio unius* was used in a context in which the relevant legislative history supported the inference that the express remedy was intended to be the exclusive remedy, *Touche Ross* may be viewed as consistent with *Cort* and *Cannon*.

The Supreme Court's decision in *Transamerica*, rendered a mere six months after *Cannon*, however, is more difficult to harmonize with *Cort*'s rejection of *expressio unius*.[126] This conflict exists notwithstand-

125. The Court noted that § 18(a) expressly created a private cause of action against those persons, including accountants, who "make or cause to be made" materially misleading statements in reports that are filed with the SEC. 442 U.S. at 572. The Court also noted that there was evidence in the legislative history of the 1934 Act that "§ 18(a) was intended to provide the exclusive remedy for misstatements contained in any reports filed with the [SEC], including those filed pursuant to § 17(a)." *Id.* at 573-74 (footnote omitted). Implicit in the proposition that § 18(a) was intended by Congress to be the exclusive remedy for the filing of misleading reports with the SEC is the unarticulated, but nevertheless undeniable, assertion that a cause of action for filing misleading statements should not be implied under any other section of the 1934 Act, including § 17(a). Consequently, the legislative history of the 1934 Act is not truly silent with respect to the availability of an implied remedy under § 17(a), notwithstanding the lack of any express reference to the existence or nonexistence of such a remedy in the legislative history of the 1934 Act.

The implication of a private cause of action in *Touche Ross* also would have been inconsistent with the underlying legislative scheme. The Supreme Court observed in *Touche Ross* that § 18(a) imposes liability on one who "make[s] or cause[s] to be made" materially misleading statements in the reports filed with the SEC. *Id.* at 572. Section 18(a) also creates an express cause of action on behalf of "any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statements . . . ." 15 U.S.C. § 78r(a) (1976). In *Touche Ross*, the Court noted that the plaintiffs who were asserting an implied cause of action under § 17(a) did not allege that they purchased or sold securities in reliance on the purportedly misleading statements made by the defendants. 442 U.S. at 572-73. The Court concluded that "where the principal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of § 17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in § 17(a) that is significantly broader than the remedy that Congress chose to provide." *Id.* at 574 (citations omitted).

Congress obviously wanted to create a private right of action in favor only of persons who purchased or sold *relying on the misstatements*. Implication of a cause of action under § 17(a) would have nullified Congress's attempt to limit potential plaintiffs to those who relied upon the misstatements and would therefore be inconsistent with the legislative scheme.

126. An indication of the conflict between the reasoning employed by the *Transamerica* majority opinion, on one hand, and the *Cort* and *Cannon* opinions and the *Transamerica* dissent, on the other hand, is illustrated by Justice Powell's position in those cases. In *Cannon*, in which a cause of action was implied, Justice Powell wrote a vigorous dissent con-

ing the fact that the majority's opinion in *Transamerica* appears to cite *Cort*[127] and *Cannon*[128] approvingly. In *Transamerica*, the plaintiff brought a derivative action on behalf of a trust and a class action on behalf of the shareholders of that trust.[129] The suit was predicated upon implied causes of action under sections 206 and 215 of the Investment Advisers Act of 1940.[130] The Supreme Court concluded that a limited cause of action could be implied under section 215,[131] but that section 206 would not support an implied cause of action.[132]

The Court described the legislative history of section 206 as "entirely silent" on the issue whether a private cause of action should exist.[133] The Court found several express provisions for enforcing section 206, and therefore applied *expressio unius* to refuse to imply a cause of action.[134] In addition, it found "circumstantial" evidence[135] to support the conclusion that the express remedies of the Investment Advisers Act were intended to be exclusive.[136] Each of the securities laws passed prior to the Investment Advisers Act contained one or more provisions

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cluding that federal courts "should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist." 441 U.S. at 749. In *Transamerica*, Justice Powell not only joined the majority, but in a concurring opinion went on to state that he viewed *Transamerica* as compatible with his dissent in *Cannon*. 444 U.S. at 25.

127. 444 U.S. at 15.

128. *Id.* at 15-16, 18, 24. The *Transamerica* majority, however, also cited Justice Powell's dissenting opinion in *Cannon*. *Id.* at 20.

129. *Id.* at 13.

130. 15 U.S.C. §§ 80b-6, 80b-15 (1976).

131. 444 U.S. at 18-19. Section 215 relates to the validity of contracts made by investment advisers and provides, in part: "Every contract made in violation of any provision of this subchapter . . ., the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract . . . ." 15 U.S.C. § 80b-15(b) (1976). The Court concluded that the language of § 215 "fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness . . . may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. . . . [T]he federal courts in general have viewed such language as implying an equitable cause of action for rescission or similar relief." 444 U.S. at 18-19.

132. 444 U.S. at 19-25. Section 206 prohibits investment advisers from engaging in various fraudulent practices. 15 U.S.C. § 80b-6 (1976).

133. 444 U.S. at 18.

134. *Id.* at 19-20.

135. *Id.* at 20-22. See note 137 *infra*.

136. *Id.* at 20.

that expressly created a private right of action.[137] The Court reasoned that the absence of such a provision under the Investment Advisers Act, when compared with the other securities statutes that contained express remedies, evidenced an intent to withhold a private cause of action under that statute.[138] The analysis used in this "comparative *expressio unius*" approach parallels the logic employed in conventional *expressio unius*, which involves only one statute. This analysis is tenuous at best.[139]

Although the majority opinion in *Transamerica* reflected the views

137. *Id.* at 20 n.10. The Court cited the following statutes: Securities Act of 1933, §§ 11, 12, 15 U.S.C. §§ 77k, 77*l* (1976); Securities Exchange Act of 1934, §§ 9(e), 16(b), 18, 15 U.S.C. §§ 78i(e), 78p(b), 78r (1976); Public Utility Holding Company Act of 1935, §§ 16(a), 17(b), 15 U.S.C. §§ 79p(a), 79q(b) (1976); Trust Indenture Act of 1939, § 323(a), 15 U.S.C. § 77www(a) (1976); Investment Company Act of 1940, § 30(f), 15 U.S.C. § 80a-29(f) (1976).

The Court also argued that the language of the jurisdictional section of the Investment Advisers Act was circumstantial evidence of Congress's intent to deny a cause of action under § 206, stating: "Early drafts of the bill had simply incorporated by reference a provision . . . which gave the federal courts jurisdiction 'of all suits in equity and *actions at law* brought to enforce any *liability* or duty created by' the statute. . . . [T]he version finally enacted into law . . . omitted any references to 'actions at law' or to 'liability.' " 444 U.S. at 21-22 (emphasis in original); *see* 15 U.S.C. § 80b-14 (1976).

The dissent argued that there was no evidence that the omission of the phrase "actions at law" was intended to preclude private suits. 444 U.S. at 31-32 (White, J., dissenting). The majority's response indicates its recognition of the tenuous nature of its argument: "The unexplained deletion of a single phrase from a jurisdictional provision is, of course, not determinative of whether a private remedy exists. But it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief." *Id.* at 22 (footnote omitted).

138. 444 U.S. at 20-21.

139. The comparative *expressio unius* argument is that, when a statute is silent regarding the availability of a private remedy, while other, related statutes expressly create private causes of action, then the omission in the silent statute (in *Transamerica*, the Investment Advisers Act) evidences an intent to exclude a private remedy under that statute. This argument may appear to have some merit, but it is not persuasive when analyzed. Consider, for example, the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1976 & Supp. III 1979), one of the statutes that the *Transamerica* majority relied upon in making the comparative *expressio unius* argument. 444 U.S. at 20 n.10. Sections 9(e), 16(b), and 18 of the 1934 Act expressly create private causes of action. 15 U.S.C. §§ 78i(e), 78p(b), 78r (1976). The existence of those express remedies in the 1934 Act, together with the principle of *expressio unius*, have not prevented the implication of private causes of action under §§ 10(b) and 14(a) of the 1934 Act. 15 U.S.C. §§ 78j(b), 78n(a) (1976); *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730-33 (1975) (implied action under § 10(b)); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) (same); J.I. Case Co. v. Borak, 377 U.S. 426, 430-32 (1964) (implied action under § 14(a)). The existence of express remedies in the 1934 Act therefore should not prevent the implication of a private cause of action under the Investment Advisers Act, which is, after all, an entirely separate legislative enactment. Accordingly, the Supreme Court's use of the comparative *expressio unius* argument does not offer much support for the conclusion that no private cause of action should be implied under the Investment Advisers Act.

of only five Justices, all the Justices agreed that the first of the four *Cort* factors was satisfied: "[T]he Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations [on investment advisers] because section 206 imposes a fiduciary duty on investment advisers and confers a benefit on their clients."[140] After examining the second factor, the majority concluded that Congress did not intend to create a cause of action, and therefore never reached the third and fourth *Cort* factors.[141] The result in *Transamerica* is thus predicated solely upon the Court's determination of legislative intent.

In support of its application of *expressio unius*, the *Transamerica* majority cited three relatively recent cases:[142] *National Railroad Passenger Corp. v National Association of Railroad Passengers (Amtrak)*,[143] *T.I.M.E., Inc. v. United States*,[144] and *Securities Investor Protection Corp. v. Barbour*.[145] Analysis of these cases, however, indicates that *Transamerica*'s reliance on them is misplaced. They do not support the proposition that when the legislative history of a statute is silent the maxim of *expressio unius* is sufficient, by itself, to demonstrate that the expressed remedies are intended to be exclusive. Although in each case the Supreme Court ultimately concluded that the express remedies were exclusive, in *Amtrak*[146] and in *T.I.M.E.*[147] this conclusion was specifically supported by legislative history. In *Barbour*, on the other hand, the Supreme Court rejected an implied cause of action principally because the Court viewed a private right to sue as inconsistent

140. 444 U.S. at 17-18; *id.* at 27-28 (White, J., dissenting). Justices White, Brennan, Marshall, and Stevens dissented in *Transamerica*, relying upon the reasoning of *Cort* and *Cannon*. As it was clear that § 206 granted a class of persons certain rights, the minority, applying *Cort* and *Cannon*, reasoned that the party asserting the implied cause of action need not demonstrate that Congress intended to create a cause of action. The question, rather, "is whether there is evidence of an express or implicit legislative intent to negate the claimed private rights of action." *Id.* at 28 (White, J., dissenting). The four-Justice minority concluded that the second *Cort* factor was satisfied because there was "no such intent to foreclose private actions." *Id.*

141. *Id.* at 23-25.

142. *See* 441 U.S. at 19-20. In addition to its reliance on the three modern cases, the Court also cited and quoted a fourth case, Botany Worsted Mills v. United States, 278 U.S. 282 (1929). That case, however, did not involve an attempt to imply a cause of action. Consequently, it offers little support for the proposition that *expressio unius* can be employed to rebut the implication of a private remedy in the absence of any supporting legislative history.

143. 414 U.S. 453 (1974).

144. 359 U.S. 464 (1959).

145. 421 U.S. 412 (1975).

146. 414 U.S. at 458-61.

147. 359 U.S. at 470-72.

with the underlying legislative scheme.[148]

In *Amtrak*, an association of passengers attempted to enjoin the discontinuance of certain passenger trains. The issue before the Court was whether a private cause of action could be implied under section 307(a) of the Rail Passenger Service Act of 1970 (Amtrak Act), which provided for a suit "upon petition of the Attorney General of the United States, or, in a case involving a labor agreement, upon petition of any employee affected thereby."[149] Relying in part on the principle of *expressio unius*, the Court concluded that section 307(a) provided the exclusive means to enforce the duties imposed by the act, and stated that, "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."[150]

In the same paragraph, however, the Court limited substantially the application of *expressio unius*. Noting that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent,"[151] the Court proceeded to review at length the legislative history of section 307(a). The Court discerned in the history of the act an intent to preclude a private right of action,[152] and denied the private cause of action only after it had determined that "the explicit legislative history of § 307(a) . . . serves to support the same interpretation of its language that would be accorded by [*expressio unius*]."[153]

In *T.I.M.E.*, the issue was whether a shipper could challenge, in postshipment litigation, the reasonableness of a charge made in accordance with the governing tariff under the Motor Carrier Act of 1935,

148. 421 U.S. at 422, 424. The reasoning in *Barbour*, decided less than a month before *Cort*, appears consistent with *Cort*. *Barbour* concludes: "As in *Amtrak*, a private right of action under [the relevant statute] would be consistent neither with the legislative intent, nor with the effectuation of the purposes it is intended to serve." *Id.*

149. 45 U.S.C. § 547(a) (1976).

150. 414 U.S. at 458.

151. *Id.* (citation omitted).

152. The Supreme Court noted that, at the hearings in the House of Representatives on the Amtrak Act, a proposal was made that would have permitted the institution of a private suit by "any person adversely affected or aggrieved" by the actions of Amtrak. *Id.* at 459. The Secretary of Transportation, who, if the legislation were enacted, would have primary administrative responsibility for implementing the Act, sent a letter to the appropriate subcommittee, in which he indicated his opposition to the institution of private suits by any "aggrieved person." *Id.* at 459-60. The *Amtrak* opinion indicates that "the Committee redrafted § 307(a) in conformity with the Secretary's recommendations" and deleted the language that would have authorized private suits by "any person adversely affected." *Id.* at 460.

153. *Id.* at 461.

which constitutes Part II of the Interstate Commerce Act.[154] The Supreme Court concluded that an implied cause of action in favor of a shipper did not exist, in part because the relevant portion of the Act, Part II, did not contain an express remedy provision comparable to those contained in Parts I and III.[155] The Court was careful to note, however, that its decision also rested on both the contemporaneous and the subsequent[156] history of the relevant statute. The Court observed that "[t]he structure and *history* of Part II . . . lead to the conclusion that . . . Congress did not intend to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates . . . ."[157]

Therefore, while both *Amtrak* and *T.I.M.E.* refer to *expressio unius*, their holdings are also predicated upon legislative histories demonstrating a congressional intent to exclude all private suits except those expressly authorized. They do not, as *Transamerica* would suggest, provide support for the use of *expressio unius* as the sole basis for denying a private cause of action in light of a legislative history that is completely silent.

The change in *Transamerica* regarding *expressio unius* is illustrated vividly by a comparison with the earlier decision in *Cort*, which was not cited by the *Transamerica* Court with respect to *expressio unius*. In *Cort*, the opponents of an implied right of action attempted to rely upon the principle of *expressio unius*, arguing that, because "a private complaint procedure" was enacted under a different section of the statute, the omission of a private remedy in the relevant section evidenced a congressional intent to preclude a private suit under the latter section. Faced with a silent legislative history,[158] the Court rejected this contention.

> [The defendants] ask us to infer from the fact that some private remedy was provided with regard to Title III of the 1971 Act an intention to deny any such remedy with regard to the criminal statutes amended in Title II.
>
> We find this excursion into extrapolation of legislative intent en-

154. 49 U.S.C. §§ 301-327 (1976).

155. 414 U.S. at 470-72. Parts I and III of the Interstate Commerce Act relate to rail and water carriers, respectively, and contain express provisions permitting a shipper to litigate for the recovery of unlawful charges paid to carriers in the past. *See* 49 U.S.C. §§ 1-27, 901-923 (1976).

156. 414 U.S. at 471.

157. *Id.* at 470 (emphasis added).

158. The Court stated: "[T]here was, as far as the parties have been able to point out and as far as we have been able independently to determine, no discussion whatever in Congress concerning private enforcement of § 610." 422 U.S. at 82 n.14.

tirely unilluminating.[159]

The situations presented in *Cort* and *Transamerica* are strikingly similar. In both, the record was devoid of legislative history to buttress the *expressio unius* argument. Moreover, the defendants in both *Cort* and *Transamerica* cited precisely the same cases, *Amtrak* and *T.I.M.E.*, in support of their use of *expressio unius*. The Court rejected the defendants' argument in *Cort* because of the lack of legislative history to support the position that the express remedy was intended to be exclusive, while the defendants in *Transamerica* prevailed. Thus, although in *Cort* and *Transamerica* the Supreme Court was presented with the same argument, supported by the same judicial authorities, the Court reached opposite conclusions. Furthermore, the *Transamerica* majority failed to recognize any inconsistency between its position and the decision in *Cort*, and appeared to cite *Cort* approvingly in other contexts.[160]

Unlike *Amtrak* and *T.I.M.E.*, the third case relied on by the *Transamerica* Court, *Securities Investor Protection Corp. v. Barbour*,[161] involved a truly silent legislative history, that of the Securities Investor Protection Act of 1970 (SIPA).[162] SIPA established the Securities Investor Protection Corporation (SIPC) as a nonprofit, private membership corporation to which most registered broker-dealers are required to belong.[163] In *Barbour*, a customer of a broker-dealer member brought suit against the SIPC, based upon an implied cause of action, requesting an order directing the SIPC to discharge its functions under SIPA with respect to the broker-dealer.[164] The Supreme Court con-

159. *Id.*

160. *See* 444 U.S. at 15.

161. 421 U.S. 412 (1975).

162. 15 U.S.C. §§ 78aaa-78*lll* (1976 & Supp. III 1979).

163. *Id.* § 78ccc(a)(1-(2)(A) (Supp. III 1979).

164. SIPA was amended in 1978 by the Securities Investor Protection Act Amendments of 1978. Pub. L. No. 95-283, 92 Stat. 249 (1978) (codified in scattered sections of 15 U.S.C. §§ 78aaa-78*lll* (Supp. III 1979)). The modifications contained in these amendments are not material for the purposes of analyzing *Barbour*'s use of *expressio unius*. Under SIPA provisions in force at the time *Barbour* was decided, if the SIPC determined that a member firm had failed or was in danger of failing to meet its obligations to customers, and the SIPC concluded that one of five specified conditions suggestive of financial irresponsibility was present, then it could "apply to any court of competent jurisdiction . . . for a decree adjudicating that customers of such member are in need of the protection provided by [SIPA]." 421 U.S. at 416. The mere filing of the application by the SIPC gave the court exclusive jurisdiction over the member firm and its property wherever located. If the court found any of the five conditions that suggest financial irresponsibility, then the court was obligated to grant the application and appoint as a trustee for the liquidation of the business such persons as the SIPC specified. *Id.* at 416-17. SIPA gave the SEC the power to apply to the appropriate district court for an order requiring the SIPC to discharge its obligations under SIPA. *Id.* at 417-18.

cluded that a customer could not maintain such an action based upon an implied cause of action under SIPA.[165]

Although the *Barbour* Court referred to *expressio unius*, reliance on this decision by the *Transamerica* Court is unjustified. *Barbour* referred to that principle in the context of the *Amtrak* decision, observing that in *Amtrak* "[i]nspection revealed that the legislative history of the Amtrak Act was entirely consonant with the implication of the statutory language that no private right of action was intended."[166] As *Amtrak* involved a legislative history demonstrating a congressional intent to exclude private suits that are not expressly authorized, it does not support the *Transamerica* Court's conclusion.[167]

Additionally, the actual holding in *Barbour* is based upon the failure to satisfy the third *Cort* factor—that the implication of a cause of action under SIPA must be consistent with the underlying purposes of the legislative scheme.[168] *Cort* and the three cases cited in *Transamerica* evidence a reluctance on the part of the Court to rely upon the principle of *expressio unius* in the absence of supporting legislative history. This reluctance may have its origins in the Court's recognition of the ambiguous nature of silence. According to the reasoning employed under *expressio unius*, when Congress has provided at least one remedy for the violation of a duty, Congress's silence with respect to other remedies is intentional; this silence demonstrates an intent to preclude the availability of all other remedies.

As a practical matter, however, silence is ambiguous. Even the *Rogers* court, which attributed great significance to silence, recognized its ambiguous nature.[169] Silence might indicate that Congress thought

165. 421 U.S. at 418-25.

166. *Id.* at 419 (footnote omitted).

167. See notes 149-53 & accompanying text *supra*.

168. *Barbour* is one of three cases cited in *Cort* as illustrative of the relevance of the third factor. *See* Cort v. Ash, 422 U.S. at 78. The *Barbour* Court feared that permitting customers an implied cause of action might precipitate unnecessary liquidations, contrary to Congress's purpose in enacting SIPA. "The SIPC's policy, therefore, is to defer intervention 'until there appear[s] to be no reasonable doubt that customers would need the protection of the Act.'. . . A customer, by contrast, cannot be expected to consider, or have adequate information to consider, these public interests in timing his decision to apply to the courts." 421 U.S. at 422 (citation omitted). The possibility of such liquidations led the Court to conclude that implication of a cause of action in favor of a customer of a registered broker-dealer would be "too inimical to the purposes of the Act," *id.* at 423, and it accordingly refused to permit such suits.

169. "Where there is silence, as *Cannon* commands, we seek for affirmative evidence of Congressional intent. Silence may indicate only that the question never occurred to Congress at all, or it may reflect mere oversight in failing to deal with a matter intended to be covered, or it may demonstrate deliberate obscurity to avoid controversy that might defeat

that it had spoken with sufficient clarity, so that the courts would understand that private enforcement was intended. As the doctrine of *expressio unius* presumes, however, silence may evidence an intent by Congress to preclude the availability of other remedies. Arguably, in light of this ambiguity, the Court has viewed as especially important the need for additional indications of legislative intent when *expressio unius* is invoked.

Implicit in *Transamerica* is the suggestion that *expressio unius* may be invoked to defeat the implication of a cause of action without the necessity of finding support for the exclusivity of the express remedy in the legislative history. The *Transamerica* majority indicated its intent to take a more restrictive approach concerning the implication of private causes of action than it had in earlier cases. Citing its 1964 decision in *J.I. Case Co. v. Borak*,[170] the majority in *Transamerica* noted that the Court's earlier decisions had "placed considerable emphasis" on implying causes of action "to effectuate the purposes of a given statute,"[171] but that more recent decisions had emphasized determining whether "Congress intended to create the private remedy asserted."[172] The Court did not have to return to the 1960's to find the application of its approach in *Borak*. In *Cannon*, decided only six months before *Transamerica*, the Court had stressed the need to imply private remedies to effectuate congressional policies: "[W]hen that remedy [implication of private causes of action] is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."[173]

This pronounced change in the attitude of the Supreme Court towards implication within such a brief period suggests that any prediction concerning the standards to be used in future implication cases, including those involving section 503, should be made with caution.

Reconciling Transamerica with Cort and Cannon

Under *Transamerica*, after the party opposing implication establishes that the statute in question does provide an express remedy, *expressio unius* may be invoked without citing any legislative history that

the passage of legislation, or it may, indeed, be a result merely of an assumption by Congress that the courts would recognize a private cause of action." 611 F.2d 1074, 1085 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

170. 377 U.S. 426 (1964).

171. 444 U.S. at 15.

172. *Id.* at 15-16.

173. 441 U.S. at 703 (footnote omitted).

supports the presumption of exclusivity.[174] The burden of proof then shifts to the proponent of implication to produce "persuasive evidence" of legislative intent.[175] The proponent of implication faces a formidable obstacle in attempting to rebut the presumption of exclusivity created by *expressio unius*, because of the likelihood that the legislative history will be silent when the statute itself is silent concerning the private remedy asserted.[176]

The minority opinion in *Transamerica*, however, relied on *Cort* and *Cannon* to develop a different presumption. The minority stated that the second *Cort* factor involved an inquiry into "whether there is evidence of an express or implicit legislative intent to negate the claimed private rights of action."[177] In effect, the *Transamerica* minority viewed *Cort* and *Cannon* as creating a rebuttable presumption of an intention on the part of Congress to create a cause of action, once it has been established that there is a clear grant of a federal right to an identifiable class. If the party opposing implication is to prevail with respect to the second *Cort* factor, that party would have to demonstrate a congressional intent to deny a private remedy. As the legislative history of the relevant statute will probably be silent or ambiguous on this issue, however, it will be difficult for that party to rebut the presumption in favor of implication.

In view of this probable silence, the allocation of the burden of proof is critical in implication cases. The party bearing the burden of proof with respect to the second *Cort* factor probably will encounter difficulty in sustaining it. The question of which party bears the burden depends on which of the two competing presumptions is applied. The presumption used by the *Transamerica* majority will make it difficult to demonstrate a congressional intent to create a cause of action. Therefore, that approach could significantly reduce the number of situations in which a private remedy will be implied. The presumption contemplated by *Cort*, *Cannon*, and the *Transamerica* minority, on the other hand, would force the party opposing implication to demonstrate a congressional intent to deny a private remedy. The practical effect of this presumption would be to permit the second *Cort* factor to be satisfied in many situations in which the *Transamerica* majority's opinion

174. *Cf.* Touche Ross & Co. v. Redington, 442 U.S. 560, 573-74 (1979) (*expressio unius* applied when legislative history showed Congress intended exclusive remedy). See notes 122-25 & accompanying text *supra*.

175. *See* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 20 (1979).

176. See notes 108-09 & accompanying text *supra*.

177. 444 U.S. at 28 (White, J., dissenting); *see also* Cannon v. University of Chicago, 441 U.S. at 694; Cort v. Ash, 422 U.S. at 82.

would require the opposite conclusion. Thus, the conflict between *Transamerica* and the *Cort-Cannon* approach has significant practical consequences.

There are at least three possible explanations for the Court's apparent abrupt shift in *Transamerica*. First, it may be possible to reconcile *Cannon*'s receptivity to the implication of private causes of action with *Transamerica*'s more restrictive approach on the ground that *Cannon* involved the alleged violation of the plaintiff's civil rights. Commentators have asserted that the Supreme Court in fact, even if not in theory, is more liberal in implying private rights of action under civil rights statutes than under other types of statutes.[178] Two of these commentators have argued that the apparently divergent results in *Cannon* and *Transamerica* substantiate their position.[179] Furthermore, the Supreme Court has made statements that suggest that it is more likely to imply a cause of action in civil rights cases than in non-civil rights cases. In *Santa Clara Pueblo v. Martinez*,[180] the Court stated that "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms."[181] This statement was cited one year later in *Cannon*.[182]

Section 503, like other statutes prohibiting employment discrimination, is a civil rights statute.[183] If the preceding analysis is correct, then the Supreme Court may use a less restrictive approach to implication of a private cause of action under section 503 than it has in its other recent implication decisions. The Court might, for example, im-

178. *Implied Rights of Action*, *supra* note 8, at 1230; Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378-80 (1978); Wermiel, *Supreme Court Protects Advisers on Damage Suits*, Wall St. J., Nov. 14, 1979, at 4, col. 1.

179. *Implied Rights of Action*, *supra* note 8, at 1240-41; Wermiel, *Supreme Court Protects Advisers on Damage Suits*, Wall St. J., Nov. 14, 1979, at 4, col. 1.

180. 436 U.S. 49 (1978).

181. *Id.* at 61.

182. 441 U.S. at 691 n.13. It is possible to view *Cannon* and *Transamerica* as consistent with respect to the implication of a private remedy because the former was a civil rights case while the latter was not. Because neither *Cort* nor *Transamerica* was a civil rights case, however, they cannot be reconciled on this ground.

183. *See, e.g.*, Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

In addition, Congress has treated Title V of the Rehabilitation Act as a civil rights statute. For example, during the Senate's debate on the adoption of the 1978 amendments, Senator Cranston affirmed his "interest in and involvement with assisting handicapped individuals in this civil rights struggle." 124 CONG. REC. 30,346 (1978). Senator Cranston also compared the attorneys' fees provision of the Senate bill with the Civil Rights Attorneys' Fee Awards Act of 1976. *Id.*

ply a private remedy under section 503 notwithstanding the lack of any contemporaneous legislative history supporting implication and the new *expressio unius* analysis it employed in *Transamerica*. This conclusion, however, is little more than speculation.

A plaintiff seeking the implication of a private cause of action under a civil rights statute must still demonstrate that all four *Cort* tests are satisfied. Although *Cannon* involved a civil rights statute, the Court's conclusion that implication of a private remedy was proper was based on an extensive analysis of all four *Cort* factors.[184] Therefore, the simple assertion that section 503 is a civil rights statute is not enough to avoid the four-part *Cort* test. In addition, even if the Supreme Court has been more willing to imply a cause of action in civil rights contexts in the past, it may become more restrictive in the future.[185]

Second, because of the tenuous reasoning of the narrow majority in *Transamerica*, it is possible to view *Transamerica* not as a dramatic change but as an aberration that future courts will ignore or distinguish. If *Transamerica* is an aberration, then the Court might revert to its pre-*Transamerica* approach, under which it would not apply *expressio unius* in the absence of supporting legislative history. As no relevant contemporaneous legislative history of section 503 exists, the maxim of *expressio unius* could not be invoked. Therefore, the defendant would be unable to demonstrate a legislative intent to deny a cause

184. *See* 441 U.S. at 689-709. *See generally Implied Rights of Action*, *supra* note 8. The commentator asserts that the Supreme Court is more likely to find an implied cause of action when dealing with a civil rights statute than with "economic-regulatory statutes," and that "continued judicial reliance upon expressions of congressional intent promises continued confusion. Judicial construction of the Rehabilitation Act demonstrates that when legislative intent is ambiguous, resort to *Cort* or any other test centered upon legislative intent produces ambiguous results." *Id.* at 1254. Because of these ambiguous results, the commentator argues that the courts should adopt a rebuttable presumption that Congress intended a private cause of action to exist under all civil rights statutes. *Id.* at 1254-60. Implicit in this argument is a rejection of the *Cort* test, at least with respect to civil right statutes.

The differing conclusions reached by various courts in applying the *Cort* tests to § 503 demonstrate the lack of certainty inherent in the use of *Cort*. See notes 7-8 & accompanying text *supra*. Notwithstanding the imprecise results produced by reliance on *Cort*, there appears no indication that the Supreme Court is prepared to abandon *Cort*. In fact, as previously indicated, *Cannon* has been widely perceived as reaffirming the continuing vitality of the *Cort* approach. It is unnecessary, therefore, to consider the merits of whether there should be a special presumption with respect to the implication of causes of action under civil rights statutes.

185. Even the *Cannon* opinion reflects the Supreme Court's increasing displeasure with the number of implication cases in the federal courts. *See* 441 U.S. at 717 ("When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.").

of action. If *Transamerica* is merely an aberration and the *Cort-Cannon* approach remains viable, then the implication of a cause of action under section 503 would be appropriate.

This explanation, however, is unpersuasive. The Supreme Court's continued affirmations of a restrictive approach cannot be ignored. In *Touche Ross*, for example, the unsuccessful plaintiff sought to invoke the Court's decision in *J.I. Case Co. v. Borak*[186] in support of his attempted implied cause of action. The Supreme Court responded:

> To the extent our analysis in today's decision differs from that of the Court in *Borak*, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today.[187]

This pronouncement suggests that *Transamerica* is not an aberration.

Finally, the third explanation of the Supreme Court's seemingly inconsistent approaches in *Cort-Cannon* and *Transamerica* is that *Transamerica* does overrule *Cort* and *Cannon*. Accordingly, *Transamerica* may be the harbinger of an even more restrictive approach to implication. To assess the ramifications of such an approach, it is necessary to examine the policy considerations that may underlie the Court's shift.

The Supreme Court has indicated the policy considerations that militate in favor of implication.[188] It is more difficult, however, to identify the policy considerations that have caused the Supreme Court to refuse to imply private rights of action. The Court typically couches its refusal in terms of the failure to satisfy one or more of the *Cort* factors. The most coherent explanation of a very restrictive approach towards implication is found in Justice Powell's dissenting opinion in *Cannon*.

Justice Powell advanced two principal arguments. First, he noted that since the Supreme Court's decision in *Cort* "no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes."[189] Thus, Justice Powell is suggesting that the *Cort* approach opens the "floodgates" of litigation.[190] Other members of the Court have also indicated their growing impatience with the number of implied cause of action cases that the Court must consider.[191]

186. 377 U.S. 426 (1964).

187. 442 U.S. at 578.

188. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. at 703; Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1969); J.I. Case Co. v. Borak, 377 U.S. at 432-33.

189. 441 U.S. at 741 (Powell, J., dissenting).

190. The "floodgates" argument is discussed at notes 339-44 & accompanying text *infra*.

191. See notes 341-43 & accompanying text *infra*.

Second, Justice Powell stated that the implication of a private remedy in *Cannon* and other cases violated the constitutional principle of separation of powers.[192] Justice Powell's analysis led to the conclusion that the four-factor *Cort* approach should be abandoned:

> In sum, I believe the need both to restrain courts that too readily have created private causes of action, and to encourage Congress to confront its obligation to resolve crucial policy questions created by the legislation it enacts, has become compelling. Because the analysis suggested by *Cort* has proven inadequate to meet these problems, I would start afresh. Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist.[193]

Justice Powell's approach to implication is the most restrictive. None of the other Justices agreed that *Cort* should be abandoned. Even if *Transamerica* is inconsistent with *Cort* and *Cannon*, it does not require a total rejection of their approach. At most, *Transamerica* alters the *Cort-Cannon* approach by emphasizing the importance of legislative intent, the second *Cort* factor, and by placing the burden of proof of that intent upon the proponent of the implied cause of action.

In summary, the rationale behind the Court's apparently conflicting positions in *Cort*, *Cannon*, and *Transamerica* is not clear at present, although it is apparent that the Court's recent decisions have placed increased emphasis on the second *Cort* factor. If either of the first two explanations is correct, then *Transamerica* is not an insurmountable obstacle to the implication of a private right of action under section 503. If the third explanation is correct, however, then the party asserting an implied cause of action would have to sustain the heavy burden

192. "The 'four factor' analysis of [*Cort*] is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." 441 U.S. at 731 (Powell, J., dissenting). Justice Powell concluded that "the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement." *Id.* at 740. The constitutional issue raised by Justice Powell need not be resolved for the purpose of determining whether a private right of action exists under § 503. The attorneys' fees provision of the 1978 amendments, 29 U.S.C. § 794a(b) (Supp. III 1979), demonstrates that Congress deems private enforcement of § 503 to be desirable. See notes 226-65 & accompanying text *infra*. Thus, the implication of a cause of action under § 503 does not require a court to "substitute its own views as to the desirability of private enforcement." As Judge Goldberg, dissenting in Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980), stated, "Courts are guilty of judicial legislation not only when they do that which Congress has not authorized, but also when they refuse to give effect to the congressional purpose." *Id.* at 1089.

193. 421 U.S. at 749.

of demonstrating that Congress intended to create a private remedy. If consideration is limited to the contemporaneous legislative history of the relevant statute, then a private cause of action cannot be implied under section 503, because there is no contemporaneous legislative history regarding the availability of a private remedy. On the other hand, if subsequent legislative history may be used to discern Congress's intent at the time of the original enactment, then the history of subsequent legislation under the Rehabilitation Act demonstrates a congressional intent that private causes of action be permitted.

Subsequent Legislative History: The 1974 and 1978 Amendments

The preceding section of this Article assumed, *arguendo*, that the 1974 and 1978 amendments to the Rehabilitation Act could not be used to ascertain whether Congress intended to create a private cause of action under section 503. This section analyzes that assumption and concludes that it is untenable. Although the 1974 amendments do not reflect such an intent, the 1978 amendments and their legislative history provide cogent support for the proposition that Congress intended to create a private remedy under section 503.

Propriety of Reliance on Subsequent Legislative History

The threshold question is whether the legislative history of a statute subsequent to its enactment can be used as a guide in the construction of the original statute. The Supreme Court has answered in the affirmative, although in effect both the Fifth Circuit in *Rogers v. Frito-Lay, Inc.*[194] and the Seventh Circuit in *Simpson v. Reynolds Metal Co.*[195] have reached a contrary conclusion in interpreting section 503.[196]

Outside the context of section 503, the Supreme Court has recognized the utility of subsequent legislative history in interpreting statutes. In *Red Lion Broadcasting Co. v. FCC*,[197] for example, the Supreme Court observed that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[198] The continuing vitality of this principle was reaffirmed in

194. 611 F.2d 1074, 1080-81 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

195. 629 F.2d 1226, 1242-43 (7th Cir. 1980).

196. Although the Second and Ninth Circuits have concluded that a cause of action could not be implied under § 503, both courts considered it appropriate to examine the 1978 amendments in discerning Congress's intent. *See* Fisher v. City of Tucson, 663 F.2d 861, 866 (9th Cir. 1981); Davis v. United Air Lines, 662 F.2d 120, 124 (2d Cir. 1981).

197. 395 U.S. 367 (1969).

198. *Id.* at 380-81 (footnotes omitted).

Cannon, in which the Court considered the use of the legislative history of the Civil Rights Attorney's Fee Awards Act of 1976[199] to interpret section 901 of Title IX of the Education Amendments of 1972.[200] The Court concluded that subsequent history should be considered:

> Although we cannot accord these remarks [made during consideration of the 1976 legislation] the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.[201]

Thus, *Cannon* suggests that a court not merely may, but must consider subsequent legislative history. Despite *Cannon*, both *Simpson* and *Rogers* paid little attention to the subsequent legislative history of section 503. In *Simpson*, the Seventh Circuit misconstrued *Cannon* as *rejecting* the use of subsequent legislative history.[202] Similarly, the *Rogers* court quoted *Cannon* only to limit the weight to be accorded subsequent legislative history. *Rogers* failed to repeat or heed *Cannon*'s mandate to examine subsequent statements that *Cannon* characterized as "authoritative expressions" of legislative intent.[203] Thus, the *Rogers* court inaccurately perceived the thrust of the Supreme Court's opinion in *Cannon*.[204]

The use of subsequent legislative history, however, has limitations. First, as the Court noted in *Cannon*, greater deference is to be accorded to contemporaneous legislative history than to subsequent legislative history.[205] Second, Supreme Court decisions suggest that the value of

199. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1976) to authorize courts in Title IX suits to award attorneys' fees to the prevailing party).

200. 20 U.S.C. § 1681 (1976).

201. 441 U.S. at 686 n.7.

202. "[A]s the Supreme Court noted in rejecting an almost identical argument in *Cannon v. University of Chicago* premised upon Congress' adoption of an attorney's fee provision four years subsequent to its adoption of Title IX, 'we would be remiss if we ignored these authoritative expressions concerning the scope and purpose' of the Title, but 'we cannot accord these remarks the weight of contemporary legislative history.' " 629 F.2d at 1242-43. Such a phrasing implies that the *Cannon* Court did not consider subsequent history, an implication that is false.

203. "The *Cannon* Court noted, despite its partial reliance on later legislative history, that 'we cannot accord these remarks the weight of contemporary legislative history . . . .' ": 611 F.2d at 1080 n.6.

204. The *Rogers* court's discussion of *Cannon* implies that the significance of subsequent legislative history is rather limited. In *Cannon*, however, the Supreme Court noted that a court would be "remiss" if it did not at least consider subsequent history. 441 U.S. at 686 n.7. Furthermore, the Court described those subsequent statements as "authoritative expressions" of congressional intent, implying that such history could be used as persuasive evidence in statutory construction. *Id.*

205. *Id.*

subsequent legislative history depends, to a significant extent, on the time interval between the two enactments. The four-year time interval in *Cannon* did not preclude examination of subsequent history. In *SEC v. Capital Gains Bureau*,[206] however, the Court refused to consider legislative history twenty years subsequent to the original act.[207] Thus, a brief time interval between amendments and the act should not preclude the use of subsequent legislative history.

In light of *Red Lion* and *Cannon*, a court must consider the subsequent legislative history of a statute, when appropriate, in construing an earlier act. Furthermore, the recognized limitations on the use of subsequent legislative history should not be obstacles to the use of either the 1974 or the 1978 amendments in discerning Congress's intent with respect to section 503. Thus, the assumption that the amendments cannot be employed in interpreting section 503 and the resulting conclusion that section 503 must be construed in the context of a silent legislative history are both invalid.

The 1974 Amendments

In more than half of the reported section 503 cases, the plaintiffs have contended that the Senate Labor and Welfare Committee Report on the 1974 amendments demonstrates a congressional intent to permit private enforcement of section 503. Although two courts have accepted this argument,[208] the majority have not.[209] The majority view appears correct.[210]

In its report on the 1974 amendments, the Senate Labor and Wel-

206. 375 U.S. 180 (1963).

207. The respondent contended that the 1960 amendments to the Investment Advisers Act reflected Congress's intention in 1940, when the original act was adopted. *Id.* at 199. Rejecting this argument, the Supreme Court indicated that "[o]pinions attributed to a Congress twenty years after the event cannot be considered evidence of the intent of the Congress of 1940." *Id.* at 199-200.

208. California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125, 129-30 (C.D. Cal. 1980); Hart v. County of Alameda, 485 F. Supp. 66, 73 (N.D. Cal. 1979). The dissenting judge in *Rogers* also accepted this argument. 611 F.2d at 1095-96 (Goldberg, J., dissenting).

209. *E.g.*, Fisher v. City of Tucson, 663 F.2d 861, 865-66 (9th Cir. 1981); Davis v. United Air Lines, 662 F.2d 120, 124 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d at 1241; Rogers v. Frito-Lay, Inc., 611 F.2d at 1081; Langman v. Western Elec. Co., 488 F. Supp. 680, 686 (S.D.N.Y. 1980).

210. Curiously, none of the decisions involving § 503 have addressed the issue whether the 1974 amendments, as subsequent legislative history, may permissibly be consulted to discover the intent of Congress. This apparent anomaly perhaps may be explained by the fact that the 1974 amendments were enacted by the Second Session of the same Congress that enacted the Rehabilitation Act a year earlier. The original Rehabilitation Act was passed by the First Session of the 93d Congress as Pub. L. No. 93-112, 87 Stat. 355 (1973). The 1974 amendments were passed by the Second Session of the 93d Congress as Pub. L.

fare Committee referred to twenty-three specific amendments to the Rehabilitation Act,[211] including changes in the methods of implementing section 504,[212] which prohibits discrimination against qualified handicapped individuals in programs and activities receiving federal financial assistance.[213] The report stated:

> This approach to implementation of section 504, which closely follows the models [of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972] would . . . *permit a judicial remedy through a private action*.
>
> It is intended that sections 503 and 504 be administered in such a manner that a *consistent, uniform, and effective Federal approach* to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections.[214]

The Committee's statement expressly contemplates the existence of a private cause of action under section 504. Advocates of a private right of action under section 503 argue that the Committee's desire for a uniform federal approach indicates that Congress also must have intended to create a private cause of action under section 503.[215]

This argument cannot withstand close scrutiny. First, the substantial differences between the language of section 504 and of section 503[216] suggest that different enforcement mechanisms might be suitable. The language of section 504 was modeled after, and is almost identical to, the language of Title VI of the Civil Rights Act of 1964 (Title VI)[217] and Title IX of the Education Amendments of 1972 (Title IX);[218] therefore, it seems appropriate that section 504 be enforced in

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No. 93-516, 88 Stat. 1617 (1974). Although no case has done so explicitly, perhaps the courts have considered the 1974 amendments to be contemporaneous legislative history.

211. S. REP. NO. 1297, 93d Cong., 2d Sess. 23-25, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6374-76.

212. *Id.* at 38-40, 1974 U.S. CODE CONG. & AD. NEWS at 6388-91.

213. Section 504 provides, in part, that "[n]o otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794 (Supp. III 1979).

214. S. REP. NO. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391 (emphasis added).

215. *See, e.g.*, Rogers v. Frito-Lay, Inc., 611 F.2d at 1095-96 (Goldberg, J., dissenting).

216. The relevant language of § 503 is quoted in note 3 *supra*. The relevant language of § 504 is quoted in note 213 *supra*.

217. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).

218. 20 U.S.C. §§ 1681-1686 (1976).

the same manner as Titles VI and IX.[219]

The language of section 503, on the other hand, bears no relationship to the language of section 504 and of Titles VI and IX. Furthermore, other than the fact that sections 503 and 504 share the common goal of ameliorating the conditions faced by handicapped individuals, their functions differ. Although some individuals and firms may be subject to the strictures of both sections 503 and 504, the sections apply to separate and distinct groups. Section 503 imposes obligations on federal contractors who sell goods or services to the federal government, while section 504 binds those who accept grants or gifts from the federal government to support programs or activities that the federal government deems desirable. Section 503 involves affirmative action employment obligations of federal contractors, while section 504 involves discriminatory practices in programs or activities receiving federal financial assistance. As both the language and function of sections 503 and 504 differ substantially, it is certainly possible that Congress intended the modes of enforcement under those sections to differ.

Second, the Committee's stated intent "that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach . . . would result"[220] is not entirely clear. On one hand, it may suggest that the enforcement procedures under these sections must be identical. On the other, it may imply that the procedures, although different, should not conflict and thereby impair the efficacy of either section.

The adjectives "consistent," "uniform," and "effective" have been judicially interpreted in the disjunctive and treated as separate and distinct goals.[221] For example, one court has found "uniformity" to be a separate aim: "In light of the rather express congressional intent that a private remedy be available to enforce Section 504, the emphasis on uniformity suggests that Congress contemplated the same scheme with respect to Section 503."[222] Although this argument cannot be definitively rejected, it is not persuasive. The derivation, language, and function of sections 503 and 504 differ substantially, and it is difficult to discern from the entire scheme of these sections a congressional "em-

219. S. REP. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6390.

220. *Id.* at 40, 1974 U.S. CODE CONG. & AD. NEWS at 6391.

221. Hart v. County of Alameda, 485 F. Supp. 66 (N.D. Cal. 1979); *see* California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125 (C.D. Cal. 1980).

222. 485 F. Supp. at 73. In *Hart*, the court also discussed the adjective "effective" as a separate goal. *Id.* at 73-74. Another district court accepted the arguments in *Hart*. *See* California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. at 129-30.

phasis on uniformity" that would compel implication of a cause of action under section 503.

Moreover, if the Committee's statement is interpreted to intend only a single goal, an "effective federal approach" against discrimination, different enforcement mechanisms might be appropriate. Under this interpretation, the Committee might have included the adjectives "consistent" and "uniform" because of its concern that "inconsistent" or "nonuniform" administration of sections 503 and 504 might impair the efficacy of the government's attack on discrimination against the handicapped.

Other statements in the report support this view. For example, the Committee stated that "[t]he Secretary of the Department of Health, Education, and Welfare . . . should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504."[223] Although different procedures may be coordinated and viewed as consistent, conflicting procedures may not. Thus, as the court reasoned in *Anderson v. Erie Lackawanna Railway*,[224] the references to "coordination" and "consistency" express the Committee's apprehension that the adoption of conflicting policies would undermine the effectiveness of the statute. Rejecting the implication of a private cause of action, the *Anderson* court stated that, "when Congress stated that sections 503 and 504 were to be 'consistent' and 'uniform,' Congress meant that the two responsible agencies were not to work at cross purposes or to duplicate each other's efforts, not that identical methods of enforcement were envisioned."[225]

In conclusion, the Senate Committee's statement imports only that a private cause of action under section 503 should be implied if the absence of such a remedy would actually conflict with the policies of, and thus impair the goals and effect of, section 504. The function and focus of the two sections are distinct, and the refusal to imply a cause of action under section 503 should have little effect on the implementation of section 504. Thus, the legislative history of the 1974 amendments does not clearly identify a congressional intent to imply a private cause of action under section 503.

223. S. REP. NO. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391.

224. 468 F. Supp. 934 (E.D. Ohio 1979).

225. *Id.* at 939.

The 1978 Amendments

Unlike the 1974 amendments, the 1978 amendments and their legislative history forcefully support the conclusion that a private cause of action should be implied under section 503. The Committee Reports in both houses of Congress in 1978 demonstrate Congress's understanding that in 1973 it had created a private remedy for violations of section 503. Section 505(b) of the 1978 amendments permits courts to grant attorneys' fees in suits brought under Title V of the Rehabilitation Act.[226] The legislative history of this provision reveals that Congress intended by this amendment not simply to allow, but even to encourage, private suits by handicapped victims of discrimination.

The House Committee on Education and Labor reported favorably on the House bill, which included a provision for attorneys' fees similar to that included in section 505(b) as finally enacted. The Committee noted that this section would permit courts to award attorneys' fees to prevailing parties other than the United States "in any action or proceeding to enforce [section 503]."[227] In contrast, the Senate Report, by the Committee on Human Resources, indicates with even greater clarity that section 505(b) was intended to facilitate the enforcement of section 503 through private rights of action.

> The committee believes that the rights extended to handicapped individuals under title V [which include] employment under Federal contracts . . . are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.[228]

Moreover, private enforcement was viewed as an effective means of implementation, and some legislators hoped that the availability of attorneys' fees would instigate appropriate private action. In the course of debate, Senator Cranston linked the necessity of private enforcement with the need to protect the right to employment under federal con-

226. 29 U.S.C. § 794a(b) (Supp. III 1979). See note 69 & accompanying text *supra*.

227. H.R. REP. No. 1149, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7312, 7332. The Committee stated: "Section . . . 503 relates to affirmative action in employment of the handicapped by certain Federal contractors . . . . The proposed amendment is not in any way unique. At present there are at least 90 separate attorneys' fees provisions to promote enforcement of over 90 different Federal laws. In fact, disabled individuals are one of the very few minority groups in this country who have not been authorized by the Congress to seek attorneys' fees. The amendment proposes to correct this omission and thereby assist handicapped individuals in securing the legal protection guaranteed them under title V of the act." *Id.*

228. S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978).

tracts.[229] He went on to state: "To date, we have permitted certain private enforcement of title V and, yet, we have not provided the means by which such private rights of action are meaningful. This amendment—providing attorneys' fees . . . will go a long way toward assisting . . . handicapped individuals [to vindicate their rights]."[230] He also noted that "[a]n important reason for the inclusion of the attorneys' fees provision in S. 2600 is to *encourage* appropriate private litigants to bring actions under title V of the Rehabilitation Act."[231] If there were any opponents to private enforcement of section 503, Senator Cranston's remarks should have elicited that opposition.

No opposition to Senator Cranston's remarks or to the Committee's report regarding private enforcement was voiced. Moreover, the Senator's statement elicited the response that it was "the continuing intention of Congress that private actions be allowed under . . . title V [including section 503]."[232] Thus, it was unambiguously asserted that a private right of action existed under section 503 prior to the 1978 amendments,[233] and his assertion went unchallenged.[234]

Further support for the conclusion that the 1978 amendments demonstrate Congress's understanding that it had implicitly created a cause of action under section 503 in 1973 comes from an examination of the membership of Congress in 1973 and 1978. In 1978, 341 of the legislators in office in 1973 remained in one of the Houses of Congress.[235] Not even one of these 341 legislators manifested opposition at any time to the reports of the relevant committees that clearly contemplated the existence of a private cause of action under section 503. In-

229. 124 CONG. REC. 30,346 (1978).

230. *Id.* at 30,347.

231. *Id.* at 30,349 (emphasis added).

232. 124 CONG. REC. 30,349 (1978) (remarks of Sen. Bayh).

233. Although Senator Cranston's encouragement of private suits was directed to suits brought under Title V as a whole, his earlier comments nevertheless specifically included the right to employment under federal contracts as a Title V right, requiring private vigilance. See note 229 & accompanying text *supra*.

234. Senator Cranston's remarks are entitled to some deference; he was the floor manager of the Rehabilitation Act and the 1974 Amendments and the author of the attorneys' fees provision of the 1978 amendments. *See* Rogers v. Frito-Lay, Inc., 611 F.2d at 1098 (Goldberg, J., dissenting).

235. In 1978, there were 267 Representatives who had been Representatives in 1973. *See* 2 CONG. INDEX (CCH) 93d Cong., 3381-86 (1973-74); 2 CONG. INDEX (CCH) 95th Cong., 25,501-06 (1977-78). In addition, there were 68 Senators in 1978 who had been Senators in 1973. *See* 1 CONG. INDEX (CCH) 93d Cong., 1899-1900 (1973-74); 1 CONG. INDEX (CCH) 95th Cong., 11, 501-02 (1977-78). Finally, there were six Senators in 1978 who had been Representatives in 1973. *See* 2 CONG. INDEX (CCH) 93d Cong., 3381-86 (1973-74); 1 CONG. INDEX (CCH) 95th Cong., 11,501-02 (1977-78).

deed, none of the thirteen legislators who voted against the 1978 amendments objected to their enactment on the ground that a cause of action did not exist under section 503 or that it was not created in 1973. Furthermore, no objection was raised on the floor of the Senate, even to comments that Congress had previously created a private right of action under section 503, and that the provision for attorneys' fees was intended to "encourage" private lawsuits by handicapped individuals.

Given these multiple indications in 1978 that Congress had created a cause of action in 1973, the failure of even one of the 341 members of Congress in both years to object is significant. This silence could be explained, at least theoretically, on the ground that all of the 341 legislators involved had a faulty recollection of their own intent in 1973 or that they had changed their position in the interim. It is submitted, however, that with so large a number of legislators involved it is improbable that all of them suffered a lapse of memory or a change of opinion. It seems more probable that no objection was raised to the statements made in 1978 because those statements accurately reflected Congress's intent in 1973.

The relevance of Congress's perception in 1978 that a private cause of action already existed under section 503 was underscored by the Supreme Court's very recent opinion in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*.[236] In that opinion, which was rendered in May 1982, the Supreme Court found an implied cause of action under the Commodity Exchange Act.[237] In the process of discerning legislative intent, the Supreme Court expressly sanctioned reliance upon "Congress' perception of the law that it was shaping or reshaping."[238]

236. 102 S. Ct. 1825 (1982).

237. *Id.* at 1839-41. The predecessor of the Commodity Exchange Act (CEA) was enacted in 1922, and major amendments to that statute were made in 1936, 1974, and 1978. *Id.* at 1827 n.1.

238. *Id.* at 1839. The Court also stated that "[t]he key to this case is our understanding of the intent of Congress in 1974 when it comprehensively reexamined and strengthened the federal regulation of futures trading." *Id.*

In *Curran*, the Court noted that "[p]rior to the comprehensive amendments to the CEA enacted in 1974, the federal courts routinely and consistently had recognized an implied private cause of action . . . for violation of provisions of the CEA . . . ." *Id.* The Supreme Court maintained that Congress must have been aware of this case law, which it described as part of the "contemporary legal context." *Id.* It rested this position, in part, on a quotation from the majority opinion in *Cannon*: "[I]t is always appropriate to assume that our elected representatives, like other citizens, know the law." *Id.* (citation omitted). Finally, the *Curran* majority concluded: "In that context [that a cause of action had been implied under the CEA prior to 1974], the fact that a comprehensive reexamination and significant amendment [in 1974] of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to

If Congress did not believe it had created a private right of action in 1973, then its inclusion of the attorneys' fees provision in the 1978 amendments was a meaningless and futile gesture. Such an interpretation would conflict with the venerable rule of statutory construction that statutes should not be interpreted as meaningless when another interpretation is possible.[239] Thus, by adopting the 1978 amendments, Congress manifested by *conduct* its belief that it had created a private remedy in 1973.

Cannon v. University of Chicago presented an analogous situation.[240] In both Title IX and section 503, a federal statute conferred a federal right on a particular class, but in each case the relevant statute was silent on the availability of a private remedy. Furthermore, in both

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preserve that remedy." *Id.* at 1841 (footnote omitted). In effect, the majority argued in *Curran* that Congress "perceived" a cause of action as existing prior to the 1974 amendments and that Congress's expectation that this cause of action would continue to be available should not be defeated.

An analogous argument can be advanced with respect to section 503. At the time that the 1978 amendments were being considered and adopted, no court of appeals had decided a case involving an attempt to imply a cause of action under that statute. See note 7 *supra*. Several district courts had, however, decided section 503 cases at that time, but they had reached differing conclusions. See note 8 *supra*. Nevertheless, as the relevant committee reports, congressional debate, and the enactment of section 505(b) make abundantly clear, Congress certainly perceived that a cause of action existed under section 503 in 1978. See notes 226-37 & accompanying text *supra*. As *Curran* teaches, that perception should be considered in discerning legislative intent, and courts should be reluctant to defeat Congress's expectations with respect to existing law.

Documentation of Congress's "perception" that a cause of action existed under the CEA is considerably more tenuous than its perception that a private right of action existed under section 503. The dissenting opinion in *Curran* noted that "[i]n the hundreds of pages of committee hearings and reports that preceeded [sic] the 1974 amendments, the Court is unable to discover even a single clear remark to the effect that the 1974 amendments would create or preserve private rights of action." 102 S. Ct. at 1852. The majority was forced to rely on the assumption that Congress was aware of existing case law. *Id.* at 1839. The legislative history of the 1978 amendments to the Rehabilitation Act, on the other hand, is replete with statements that a cause of action existed under section 503. Accordingly, Congress's perception of the existence of a cause of action under section 503 is entitled to even more weight in ascertaining legislative intent than the Supreme Court gave to Congress's perception of the law with respect to the CEA.

239. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 418 (1891); *see also* Clarke v. FELEC Servs., 489 F. Supp. 165, 168 (D. Alaska 1980). In *Clarke*, the district court relied upon the 1978 amendments in concluding that a cause of action should be implied under § 503. The court responded to the Fifth Circuit's argument in *Rogers* that "[a]n assumption is not a law" by stating that "[w]hile 'an assumption is not a law,' neither is a law to be construed a nullity." *Id.*

240. See notes 199-201 & accompanying text *supra*.

instances, several years after the enactment of the statute conferring the federal right, a provision for the discretionary award of attorneys' fees was adopted. Finally, statements at the time of the subsequent adoption of the attorneys' fees provisions of both statutes intimated that Congress intended, at the time of the enactment of the provision conferring the federal right, to create a private cause of action.[241]

In *Cannon*, the Supreme Court relied, in part, on subsequent legislative history to support its conclusion that a cause of action existed under Title IX.[242] The subsequent legislative history of section 503 speaks with even greater clarity than does the subsequent history of Title IX. Therefore, the legislative history of the 1978 amendments may properly be invoked to find a congressional intent to imply a private right of action under section 503.

Several district courts have adopted this interpretation, relying upon the 1978 amendments in concluding that an implied cause of action exists under section 503.[243] Nevertheless, the Fifth Circuit in *Rogers v. Frito-Lay, Inc.*[244] rejected attempts by the plaintiff to rely upon the 1978 amendments.

The majority opinion in *Rogers* generally rejected, in effect, the use of subsequent legislative history as a tool for discerning prior legislative intent. Focusing only on contemporaneous legislative history,[245] the court refused to find meaning in section 503 as a result of the later statute and of remarks by individual members of Congress made at a later time, stating: "What happened after a statute was enacted may be history and it may come from members of Congress, but it is not part of the legislative history of the original enactment."[246] Unfortunately, the *Rogers* court misconstrued the function and application of subsequent legislative history as defined in *Cannon*. *Cannon* expressly sanctioned the use of later statutes and subsequent remarks by individual members

241. In *Cannon*, these subsequent statements regarding Title IX were made on the floor of Congress during debate on the attorneys' fees legislation. *See* 441 U.S. at 686 n.7. In the case of § 503, these statements were made both on the floor of Congress and in the relevant committee reports. See notes 227-38 & accompanying text *supra*.

242. *See* 441 U.S. at 686 n.7 (1979).

243. See note 97 & accompanying text *supra*.

244. 611 F.2d at 1081-82.

245. *Id.* at 1080. "In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments—whether accepted or rejected—and the remarks in debate preceding passage." *Id.* These remarks, together with subsequent statements, reflect the *Rogers* court's preoccupation with contemporaneous legislative history to the almost total exclusion of subsequent legislative history.

246. *Id.*

of Congress to construe prior statutes.[247] Furthermore, although the *Rogers* court was correct in noting that statements made by members of Congress after the adoption of a statute are "not part of the legislative history of the original enactment,"[248] limited reliance on such evidence to determine legislative intent has been clearly permitted by the Supreme Court.[249]

The *Rogers* court also objected specifically to the use of the 1978 amendments in construing section 503 on the grounds that those amendments are "the product of members of a Congress so distant in time from the enacting Congress that we cannot accept their remarks as an accurate expression of the earlier Congress's intent."[250] This argument is not compelling. Although the interval in *Cannon* between the act and the amendment was four years, the Supreme Court termed the subsequent statements by the members of the later Congress "authoritative expressions" of the earlier Congress's intent.[251] The interval between the enactment of section 503 and the 1978 amendments is five years. The passage of one extra year should not make the statements made by the members of Congress in 1978 an inaccurate or unreliable guide to the intent of Congress in 1973. Moreover, the fact that 341 members of Congress in 1973 were also members in 1978[252] suggests that the statement made during the consideration of the 1978 amendments are, contrary to the unsupported assertion in *Rogers*, "accurate expression[s] of the earlier Congress's intent."[253]

Finally, although the *Rogers* court attempted to undermine the significance of the 1978 committee reports, the court did not dispute their meaning. Conceding the fact that both the House and Senate Committee Reports in 1978 were predicated on the belief that a private cause of action existed prior to the adoption of the 1978 amendments,[254] the court questioned the validity of the committees' belief

247. 441 U.S. at 686 n.7.

248. 611 F.2d at 1080.

249. See notes 197-201 & accompanying text *supra*.

250. 611 F.2d at 1082.

251. 441 U.S. at 686 n.7.

252. See notes 235-38 & accompanying text *supra*.

253. The *Rogers* majority also attacked the use of 1978 House and Senate Committee Reports as of little value in determining the intent of Congress in 1973 because " '[t]he Committee' in 1978 or 1979 is not the [same] committee that recommended the legislation enacted in 1974 [*sic*]." 611 F.2d at 1082. In response, the dissenting judge in *Rogers* noted that "11 of the 16 members of the relevant Senate Committee in 1978 were on the committee in 1973 when the Act was passed. . . . Further, 15 of the 37 members of the relevant House committee in 1978 were also on the Committee in 1973." *Id.* at 1101 n.32 (Goldberg, J., dissenting) (citation omitted).

254. *Id.* at 1082.

that a private remedy existed. The court asserted that it may "fairly be said that the 1978 Committees of both Houses *assumed* that a private cause of action had somehow been created in the past," and concluded, "[a]n assumption is not a law."[255] Relying in part on *Rogers*, three other circuits have advanced similar arguments with respect to the 1978 amendments.[256]

The argument of these courts cannot withstand close analysis. By their use of the word "assume," defined as "[t]o take for granted, or without proof,"[257] these courts in effect state that the 1978 reports are unreliable guides to congressional intent because they are not based upon "proof," which is defined as "[a]ny fact or circumstance which leads the mind to the affirmative or negative of any proposition."[258]

These courts might be justified in implicitly asserting, as to those legislators who were not members of the relevant committees in 1973, that they took "for granted" or "without proof" the intention of the members of Congress in enacting section 503 in 1973. With respect to individuals who were committee members in 1973, however, it is untenable to assert that they took "for granted" or "without proof" their own intention concerning the creation of an implied cause of action five years earlier. Both the House and Senate Committee Reports were adopted without dissent, and therefore represent the views of all the individuals who were members of those committees in 1973 and 1978. Accordingly, the belief, which is reflected in the committee reports of both Houses, that a cause of action existed prior to the 1978 amendments, cannot be so readily dismissed by asserting that it is, in the words of *Rogers*, "an assumption not shown to have been war-

255. *Id.* (emphasis added).

256. *See* Fisher v. City of Tucson, 663 F.2d 861, 865-66 (9th Cir. 1981); Davis v. United Air Lines, 662 F.2d 120, 125-26 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1243 (7th Cir. 1980). The *Simpson* court introduced an additional argument relating to legislative intent. The court acknowledged that the attorneys' fee provision in the original bill "specifically listed § 503 as one of the sections covered by the fee provision," *id.* at 1242, and noted that the Senate report expressly indicated that the attorneys' fee provision related to § 503. *Id.* The court nevertheless concluded: "With the exception of the language from the Senate report, we find all these excerpts from the legislative history ambiguous in their reference to § 503." *Id.* This argument appears strained. Certainly, both the House report, see note 227 & accompanying text *supra*, and the debate on the floor of the Senate unambiguously support the implication of a private remedy. See notes 229-35 & accompanying text *supra*. Furthermore, even the majority in *Rogers* conceded that the reports in both the House and the Senate were predicated on the belief that a private cause of action exists under § 503. See note 254 & accompanying text *supra*.

257. WEBSTER'S NEW INTERNATIONAL DICTIONARY 168 (2d ed. 1961).

258. BLACK'S LAW DICTIONARY 1093 (5th ed. 1979).

ranted."[259] In view of the relatively large number of legislators who were members of the relevant committees in both 1973 and 1978,[260] the views expressed by these members regarding their own prior intent provide cogent support for the conclusion that Congress did intend to create a private cause of action in 1973.

In summary, the 1978 amendments and their legislative history reveal that Congress believed it had created a cause of action at the time of the enactment of the Rehabilitation Act. First, the Committee Reports of both the House and Senate Committees indicate that attorneys' fees are to be available in actions or proceedings to enforce section 503.[261] Those reports are premised on the existence of a private cause of action created at an earlier time. Second, the Senate Committee Report expressly referred to existing private rights of action in the context of section 503.[262] Third, the debate on the floor of the Senate makes it clear that private rights of action under section 503 existed prior to the adoption of the 1978 amendments.[263] Fourth, Congress's inclusion of the attorneys' fees provision in the 1978 amendments attests to its belief that it had created a private cause of action at an earlier time.[264] Finally, none of the 341 members of Congress in 1973 and 1978, nor any of the members of the relevant committees in both years, objected, during the consideration and adoption of the 1978 amendments, to the many statements that expressly or implicitly indicated that Congress had previously created a cause of action.[265]

In response to all the indications in the 1978 amendments and their legislative history that Congress had previously created an implied cause of action, those who oppose implication have only one indication of congressional intent to deny a cause of action: the maxim of *expressio unius*.[266] With the exception of *Transamerica*, the Supreme

259. 611 F.2d at 1082.

260. See note 250 *supra*.

261. See notes 227-28 & accompanying text *supra*.

262. See note 228 & accompanying text *supra*.

263. See notes 229-38 & accompanying text *supra*.

264. See notes 239-40 & accompanying text *supra*.

265. See notes 235-38 & accompanying text *supra*.

266. *See, e.g.*, Rogers v. Frito-Lay, Inc., 611 F.2d at 1085; Langman v. Western Elec. Co., 488 F. Supp. 680, 685 (S.D.N.Y. 1980); Anderson v. Erie Lackawanna Ry., 468 F. Supp. 934, 937 (E.D. Ohio 1979).

In *Rogers*, the Fifth Circuit invoked *expressio unius* as evidence of the fact that the implication of a private remedy would be inconsistent with the underlying legislative scheme. Accordingly, that court concluded, among other things, that the third *Cort* factor was not satisfied. 611 F.2d at 1084-85. In *Transamerica*, 444 U.S. at 20-21, *Cannon*, 441 U.S. at 711, and *Cort*, 422 U.S. at 82 n.14, the Supreme Court considered the maxim of *expressio unius* as bearing on legislative intent. Accordingly, even though *Rogers* considered

Court has rejected the use of this principle in the absence of supporting legislative history;[267] such history does not exist with respect to section 503. Even if it is assumed that *expressio unius* may be invoked without additional supporting legislative history, that principle must yield to "clear contrary evidence of legislative intent."[268] The subsequent legislative history of the 1978 amendments provides sufficiently "clear contrary evidence of legislative intent" to overcome the presumption of *expressio unius* that the express administrative remedy contained in section 503 was intended to be the exclusive remedy for violations of that section.

In conclusion, when the 1978 amendments are employed in the construction of section 503, it becomes clear that Congress did intend to create a private cause of action under that section, and accordingly, the second of the four *Cort* tests is satisfied.

The Third Cort Test

> Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?[269]

In *Cannon v. University of Chicago*, the Supreme Court elaborated upon its criteria for satisfaction of the third *Cort* test: "[A] private remedy should not be implied if it would frustrate the underlying purpose

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expressio unius with respect to the third *Cort* factor, it is treated as if it were invoked in connection with the second *Cort* factor.

267. See notes 110-73 & accompanying text *supra*.

268. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453, 458 (1974); *see also* Transamerica Mortgage Advisors v. Lewis, 444 U.S. at 20. In the district court opinion in *Rogers*, the court also argued that the repeated unsuccessful attempts to amend Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979), to include the handicapped as a protected class demonstrated Congress's intent to preclude private suits under § 503. Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 202 (N.D. Tex. 1977), *aff'd on other grounds*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 887 (1980). Title VII creates an express cause of action, in certain circumstances, to individuals who believe they were victims of the discrimination proscribed by Title VII. 42 U.S.C. § 2000e-5(f)(1) (1976). If Title VII were amended to include the handicapped, they would clearly have a private cause of action. Notwithstanding this fact, the reasoning of the district court in *Rogers* is deficient. Implicit in this reasoning is the premise that there is a causal connection between the grant of an express cause of action if Title VII were amended to include the handicapped and the rejection of the "perennial attempts" to amend Title VII. The district court in *Rogers*, however, did not establish this causal connection.

There are other, equally plausible, explanations of Congress's failure to amend Title VII to include the handicapped. Under § 503, only federal contractors are required to take affirmative action with respect to the handicapped, as opposed to the far larger number of employers subject to the strictures of Title VII. *See* S. REP. No. 316, 96th Cong., 1st Sess. 3 (1979). See note 308 *infra*.

269. 422 U.S. at 78.

of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."[270] Some ambiguity remains whether the test will be satisfied as long as there is no inconsistency between implication and the underlying legislative scheme, or, alternatively, whether this test requires a showing that implication is necessary to achieve the statutory purpose. Under either standard, however, implication of a cause of action under section 503 meets the applicable standard.

Several courts that have declined to imply a cause of action under section 503 rested their conclusion, at least in part, on their perception of "inconsistencies" between a private remedy and the statutory scheme envisioned by Congress.[271] Analysis of those purported inconsistencies reveals that none involves a true conflict with the legislative goals of section 503, and, therefore, none militates against implication under that section.

In *Cannon*, the Supreme Court reasoned that, because of conditions surrounding Title IX, the implication of a private remedy was not merely consistent with the statutory purpose, but also especially "appropriate" or "efficient" in achieving that purpose.[272] Some plaintiffs seeking the implication of a cause of action under section 503 have advanced arguments parallel to those successfully made in *Cannon*.[273] Although not all of these analogies are well founded, their rejection does not bar implication of a right of action. Instead, the question whether a private cause of action is consistent with the underlying legislative purposes of section 503 must be decided on other grounds. Implication under section 503 is not inconsistent with the legislative scheme envisioned by Congress. In addition, there are strong indica-

270. 441 U.S. at 703 (footnote omitted).

271. In addition, some courts have relied upon the principle of *expressio unius* in finding an implied private remedy inconsistent with the express administrative remedy provided in § 503(b). *See* Rogers v. Frito-Lay, Inc., 611 F.2d at 1085; Simon v. St. Louis County, 23 F.E.P. Cases (BNA) 1315, 1321 (E.D. Mo. 1980); Coleman v. Noland Co., 21 F.E.P. Cases (BNA) 1248, 1249 (W.D. Va. 1980). As a practical matter, the substance of this argument is the same as the *expressio unius* argument under the second *Cort* factor: the existence of an express administrative remedy and the statute's silence with respect to a private remedy demonstrate Congress's intent to preclude private litigation. See notes 91-94 & accompanying text *supra*.

272. 441 U.S. at 704-08.

273. *See, e.g.*, Rogers v. Frito-Lay, Inc., 611 F.2d at 1104-06 (Goldberg, J., dissenting); Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1171-73 (S.D.N.Y. 1980); Hart v. County of Alameda, 485 F. Supp. 66, 75-76 (N.D. Cal. 1979).

tions that Congress perceives private lawsuits as necessary to achieve adequate and effective enforcement of section 503.

The Effect of Litigation on Conciliation

Several courts have asserted that the possibility of private lawsuits would adversely affect the process of informal conciliation that Congress intended as the principal method of securing compliance with the affirmative action obligations imposed by section 503.[274] For example, in *Wood v. Diamond State Telephone Co.*,[275] the court concluded that the implication of a private cause of action would be inconsistent with the conciliation efforts of the DOL. The court stated that "the existence of independent federal litigation, even if stayed during the administrative process, and the possibility of relief independently fashioned by a federal court is likely to impair the effectiveness of the administrative conciliation process."[276]

Although the preferred method of resolving disputes resulting from alleged violations of section 503 is informal conciliation,[277] it does not follow that private litigation is necessarily inconsistent with the underlying purpose of the statute. Neither the contemporaneous nor the subsequent legislative history of section 503 suggests that Congress perceived any inconsistency in creating a framework both for administrative enforcement under section 503(b)[278] and for private enforcement as suggested by the provision for awarding attorneys' fees to successful litigants in section 505(b).[279] To the contrary, both the Senate report and the Senate debates indicate that Congress viewed private suits as a necessary supplement to administrative enforcement.[280] Congress's attitude supports the view that these alternative remedies are compatible.

The DOL has taken inconsistent positions with respect to the implication of a cause of action under section 503. The DOL initially

274. *See* Simpson v. Reynolds Metals Co., 629 F.2d at 1243 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d at 1084; Coleman v. Noland Co., 21 F.E.P. Cases (BNA) 1248, 1249 (W.D. Va. 1980); Anderson v. Erie Lackawanna Ry., 468 F. Supp. 934, 939 (E.D. Ohio 1979); Wood v. Diamond State Tel. Co., 440 F. Supp. 1003, 1009-10 (D. Del. 1977).

275. 440 F. Supp. 1003 (D. Del. 1977).

276. *Id.* at 1009-10.

277. The DOL's regulations provide: "In every case where any complaint investigation indicates the existence of a violation of the affirmative action clause or these regulations, the matter should be resolved by informal means, including conciliation and persuasion, whenever possible." 41 C.F.R. § 60-741.28(a) (1980).

278. 29 U.S.C. § 793(b) (1976).

279. *Id.* § 794a(b) (Supp. III 1979).

280. *See* S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978); 124 CONG. REC. 30,346 (1978) (remarks of Sen. Cranston). See notes 228-38 & accompanying text *supra*.

supported the implication of a cause of action,[281] but after the change in the Administration in 1981, it reversed its position to oppose implication. The DOL's original position was set forth in an *amicus curiae* brief that it filed in *Chaplin v. Consolidated Edison Co.*[282] There the DOL maintained that the existence of a private cause of action would not only not interfere with conciliation, but would actually facilitate attempts to resolve section 503 disputes through conciliation, because the "specter of litigation would have a sobering effect on the parties involved."[283] The *Chaplin* court concluded, "In light of the position of the Department of Labor, clearly a rational view, the claimed potential for interference with the work of the administrative agency is not a valid reason for finding no implied private right of action."[284]

In 1981, the DOL adopted the position that a cause of action should not be implied under section 503.[285] The interpretation of a statute by the agency charged with its enforcement is typically accorded great deference by the courts.[286] The Supreme Court, however, has recognized limitations on the applicability of this principle.

In *General Electric Co. v. Gilbert*,[287] the Court had to determine whether a particular company policy violated Title VII's prohibition of sex-based discrimination. The Equal Employment Opportunity Commission (EEOC), which has enforcement responsibility for Title VII,[288] originally indicated that the practice in question did not violate this statute.[289] The EEOC subsequently issued guidelines in which it took the opposite position.[290]

In evaluating the significance to be accorded the EEOC's second position, the Supreme Court cited an earlier case in which it stated that "[t]he weight of such a judgment . . . will depend upon . . . [in part] its consistency with earlier and later pronouncements . . . ."[291] Furthermore, the Supreme Court noted that in another context it had "declined to follow administrative guidelines in the past where they

281. *See* Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165 (S.D.N.Y. 1980).
282. *Id.*
283. *Id.* at 1172. The DOL took the same position in California Paralyzed Veterans Ass'n v. FCC, 496 F. Supp. 125, 131 (C.D. Cal. 1980).
284. 482 F. Supp. at 1172.
285. DAILY LAB. REP. (BNA) No. 144, at A-8-9 (July 7, 1981).
286. See note 65 & accompanying text *supra*.
287. 429 U.S. 125 (1976).
288. *See id.* at 140-41.
289. *Id.* at 142-43.
290. *Id.* at 140-41 (citing 29 C.F.R. § 1604.10b (1975)).
291. *Id.* at 142 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

conflicted with earlier pronouncements of the agency."[292] Accordingly, the DOL's current position need not be accorded great deference.

The principal reason for the DOL's original position was that its limited resources would not enable the DOL expeditiously to resolve and investigate its "large backlog of Section 503 administrative complaints."[293] The problem of limited resources is analogous to the problems that motivated the Department of Health, Education, and Welfare (HEW) to maintain in *Cannon* that private enforcement would provide effective assistance in achieving the purposes of Title IX.[294] Relying on HEW's own evaluation, the Supreme Court concluded in *Cannon* that the implication of a private cause of action under Title IX was not inconsistent with the underlying legislative scheme,[295] which contemplates significant reliance on administrative enforcement.[296] In addition, the Supreme Court feared that the lack of enforcement resources would leave Title IX violations unvindicated, as well as interfere with the orderly functioning of HEW.[297]

Statistics provided by the DOL suggest that analogous problems are likely to arise if a private cause of action is not implied under section 503. In 1980, the DOL investigated only about half of the section

292. *Id.* at 143.

293. Affidavit of Weldon J. Rougeau, then Director of the Office of Federal Contract Compliance Programs, Department of Labor, at 2, Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165 (S.D.N.Y. 1980), *reprinted in* Rogers v. Frito-Lay, Inc., 611 F.2d at 1108-09, Appendix.

294. *See* 441 U.S. at 706-08. HEW argued that it did "not have the resources necessary to enforce Title IX in a substantial number of circumstances." *Id.* at 708 n.42.

295. *Id.* at 706-08.

296. *Id.* at 683-84.

297. "[T]he agency may simply decide not to investigate—a decision that often will be based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint. In that case, if no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds. But surely this alternative is far more disruptive of HEW's efforts efficiently to allocate its enforcement resources under Title IX than a private suit against the recipient of federal aid could ever be." *Id.* at 707 n.41 (citations omitted).

The Supreme Court's willingness in a civil rights context to accept the lack of adequate enforcement resources as a basis for implying a private remedy is not a new position. In Allen v. State Bd. of Elections, 393 U.S. 544 (1969), the Supreme Court implied a cause of action in favor of private citizens under the Voting Rights Act of 1965. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976). That Act expressly provided for enforcement only through suits brought by the Attorney General. *Id.* § 1973j(d), (e). Noting the Attorney General's limited staff, the Court concluded: "The guarantee of § 5 that no person shall be denied the right to vote for failure to comply [with the provisions of the Voting Rights Act] might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557 (footnote omitted).

503 complaints filed with it.[298] The DOL projected the filing of 2025 complaints in 1981.[299] The DOL, however, planned to investigate only 745.[300] Thus, almost two-thirds of the complaints filed under section 503 by handicapped individuals would not even be investigated, much less resolved on their merits. An analogous situation convinced the Supreme Court in *Cannon* to imply a private remedy. The Court's reasoning is equally applicable to section 503 and strongly militates in favor of private enforcement of that statute.

Because of delays in the judicial system, it would appear unlikely that the implication of a cause of action under section 503 would make more prompt the resolution of disputes under that statute. Implication of a cause of action, however, would at least ensure that disputes concerning alleged violations of section 503 were resolved on their merits. As section 503 is a civil rights statute, this result is more consistent with the legislative scheme envisioned by Congress than is exclusive reliance on administrative enforcement.[301] Congress fails to perceive any conflict between conciliation through the administrative process and private lawsuits. The implication of a private cause of action, therefore, should not be deemed inconsistent with the underlying statutory scheme on that ground. The DOL's inadequate enforcement resources militate in favor of the implication of a private cause of action. Acceptance of the conclusion that private enforcement of section 503 is a necessary supplement to administrative enforcement demonstrates that private litigation and administrative enforcement, with the latter's emphasis on conciliation, are not inconsistent.

The Effect of Private Suits on Contractors

The court in *Anderson v. Erie Lackawanna Railway*[302] concluded that a private cause of action was inconsistent with the legislative scheme because the possibility of damages arising out of a private lawsuit, as opposed to the sanctions available in a government action, would be too insignificant to assist in achieving compliance by federal

298. During the fiscal year, 2500 complaints were filed, of which the DOL investigated only 1287. 6 MAINSTREAM 2 (Mar.-Apr. 1981) (information from DOL documents) (periodical published by Mainstream, Inc., Wash., D.C. 20005).

299. *Id.* In 1980, the DOL estimated that it would receive 1900 complaints, and it actually received 2500.

300. *Id.*

301. Section 503(b) has not been modified since the enactment of the Rehabilitation Act in 1973. Section 503(b) directs that the DOL "shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant . . . ." 29 U.S.C. § 793(b) (1976).

302. 468 F. Supp. 934 (E.D. Ohio 1979).

contractors with section 503. Therefore, according to the court, a private cause of action would be of "marginal utility."[303]

The court's position in *Anderson* is vulnerable on two grounds. First, the court's logic is flawed. When a range of sanctions exists, the threat of the imposition of relatively less severe sanctions will not *necessarily* be an inadequate deterrent to the proscribed conduct. Accordingly, the conclusion in *Anderson* that private suits necessarily will be ineffective in securing compliance just because other more drastic sanctions exist is untenable.[304]

Second, the conclusion that, as a practical matter, private suits would not be useful in obtaining compliance with section 503 is doubtful. Congress obviously views private litigation in situations involving other types of employment discrimination, such as sex and race, as useful in securing compliance with the statutory prohibitions.[305] There is no readily apparent reason that private litigation should be less successful with respect to the handicapped. Thus, analysis of *Anderson* indicates that its conclusion that private lawsuits would be ineffective in securing compliance with section 503 is unpersuasive.

In *Wood v. Diamond State Telephone Co.*,[306] the court concluded that a private cause of action should not be implied for precisely the opposite reason to the one posited by the *Anderson* court—that implication would expose federal contractors to too great a burden. The burden feared is the possibility of *de novo* litigation.[307] In the past, Congress has not viewed the imposition of *de novo* litigation upon employers in other civil rights contexts as too oppressive or burdensome. Title VII, for example, exposes a large number of employers to the possibility of administrative proceedings followed by *de novo* litigation.[308]

303. "The present regulations authorize the Secretary [of the DOL] to withhold contract payments, cancel the contract, and disbar [sic] a contractor. The possibility of civil liability for damages in an action brought by a private individual would be of minimal value to motivate a contractor to comply with affirmative action requirements when such a civil liability is compared with the sanctions which the Secretary can impose. Thus, a private right of action would be of marginal utility in enforcing section 503." *Id.* at 939.

304. In addition, an individual contemplating unlawful conduct for which a range of sanctions exists has no way of knowing prior to that conduct which of those sanctions will be imposed in his or her case.

305. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

306. 440 F. Supp. 1003 (D. Del. 1977).

307. *Id.* at 1009. If a private remedy were implied under § 503 on a *de novo* basis, any disputed issues of fact would be determined anew in the district court, which would not be bound by factual determinations made by the DOL. *Cf.* Chandler v. Roudebush, 425 U.S. 840, 843-45 (1976) (*de novo* proceedings under Title VII).

308. The DOL has estimated that "Title VII applies to approximately 700,000 private

This suggests that Congress does not view the possibility of *de novo* litigation as inherently burdensome.

Moreover, under section 503, the possibility of *de novo* litigation does not place an unreasonable burden on federal contractors, because, unlike employers covered by Title VII, federal contractors have voluntarily chosen to do business with the federal government and thereby have agreed to comply with the affirmative action clause in their contracts. Thus, the "exposure" of a federal contractor to *de novo* litigation is not so burdensome as to be inconsistent with the legislative scheme of section 503.

Neither *Anderson* nor *Wood* demonstrates any significant inconsistency between the implication of a private cause of action and the legislative scheme contemplated by Congress. Notwithstanding the diametrically opposed views of these two courts, the implication of a private cause of action would provide a reasonable and useful complement to administrative action in securing the civil rights of the handicapped.

Private Suit as a Necessary Alternative to "Severe" Administrative Sanctions

In *Cannon v. University of Chicago*, the Supreme Court justified the implication of a private cause of action, in part, in its determination that a private remedy might be more "appropriate" and efficient in achieving the statutory goal of effective individual protection against discrimination[309] than would the only express remedy provided in Title IX, the termination of federal financial assistance.[310] Termination of financial assistance, the Court observed,

> is . . . severe and often may not provide an appropriate means of accomplishing [the statutory purpose of providing "individual citizens" with protection from discrimination] if merely an isolated violation has occurred. In that situation, the violation might be remedied more efficiently by an order requiring an institution to ac-

employers of 15 or more employees and to approximately 30,000 units of state and local government and 50,000 national and local labor unions." S. REP. No. 316, 96th Cong., 1st Sess. 3 (1979). Section 503 applies only to 300,000 federal contractors. *Id.*

309. The Court noted that two statutory goals were intended to be promoted by Congress in enacting Title IX, which prohibits sex-based discrimination by certain educational institutions receiving federal financial assistance. Congress did not want to use federal resources to support discriminatory practices, and Congress "wanted to provide individual citizens effective protection against those practices." 441 U.S. at 704.

310. The statute provides that this remedy can be invoked by a federal agency empowered to extend federal financial assistance to any education program or activity if it determines, after a formal hearing, that the recipient of such assistance violated the provisions of Title IX. 20 U.S.C. § 1682 (1976).

cept an applicant who had been improperly excluded.[311]

The Supreme Court was concerned with the possibility that, when an "isolated violation" occurred, the agency charged with enforcement might refuse to cut off federal funding, thus allowing the discriminatory practice to go uncorrected. The *Cannon* court, therefore, concluded that a private action would be well suited to remedy an isolated violation.

The dissenting opinion in *Rogers v. Frito-Lay, Inc.*,[312] along with the decisions in *Chaplin v. Consolidated Edison Co.*[313] and *Hart v. County of Alameda*,[314] all advance this argument to support implication of a private right of action under section 503. Regulations promulgated by the DOL provide that the Office of Federal Contract Compliance Programs (OFCCP), the DOL agency that enforces section 503, may impose various administrative sanctions for violations, including withholding of progress payments, termination of existing contracts, and debarment from future federal contracts.[315] The dissenting judge in *Rogers* stated that, if there has been an isolated violation of section 503, "the OFCCP will be hesitant to invoke the rather draconian remedies provided for in its regulations."[316] Both the *Chaplin*[317] and *Hart*[318] courts make comparable statements. Unfortunately, the analogy to *Cannon* is not well drawn. The analogy rests upon the unarticulated and erroneous assumption that the OFCCP's only options are either to invoke one or more of the three remedies or to leave unrectified the violation of section 503.

In *Cannon*, the "severe" remedy of a termination of federal financial assistance was the remedy expressly prescribed by Congress in the statute.[319] In section 503, however, Congress delegated to the President the authority to prescribe sanctions for violating section 503.[320] The President, in turn, delegated that authority to the DOL.[321] Thus, the three sanctions that might be imposed for violation of section 503 were created *by the DOL* in *its* regulations and are therefore subject to

311. 441 U.S. at 705 (footnotes omitted).
312. 611 F.2d 1074, 1104 n.40 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 449 U.S. 889 (1980).
313. 482 F. Supp. 1165, 1171-72 (S.D.N.Y. 1980).
314. 485 F. Supp. 66, 75-76 (N.D. Cal. 1979).
315. 41 C.F.R. § 60-741.28 (1980).
316. 611 F.2d at 1105 (Goldberg, J., dissenting) (footnote omitted).
317. 482 F. Supp. at 1171-72.
318. 485 F. Supp. at 75-76.
319. 20 U.S.C. § 1682 (1976).
320. 29 U.S.C. § 793 (1976 & Supp. III 1979).
321. Exec. Order No. 11,758, 3 C.F.R. 841 (1971-1975 Compilation).

amendment by the DOL. Accordingly, the DOL could provide for less severe sanctions, which it would be more likely to invoke if there were an isolated violation.

Furthermore, the DOL's existing regulations permit it to seek judicial enforcement of the affirmative action clause in the event it determines that a violation of that clause has occurred.[322] The DOL, therefore, could seek legal or equitable relief less "severe" than the three remedies expressly provided for in its regulations. Accordingly, the implication of a private cause of action cannot be justified on the ground that it is a necessary alternative to the "draconian remedies" created in the DOL's regulations.

In *Hart v. County of Alameda*,[323] the court adopted the *Cannon* analogy, despite its express recognition of the alternative remedies available. The *Hart* court focused only on the prescribed administrative remedies, characterizing those remedies as "rather severe procedures [that] simply do not provide the kind of narrow, specific relief appropriate to remedy individual instances of discrimination."[324]

The court's concern with the appropriateness of the administrative process does not appear well founded. In *OFCCP v. E.E. Black, Ltd.*,[325] the first final Administrative Order issued under section 503, a federal contractor was found to be in violation of the affirmative action clause in failing to hire a particular apprentice.[326] The relief granted in the final Administrative Order required the federal contractor to "make, in writing, an immediate offer of employment as an apprentice carpenter" to the complainant.[327] In addition, the contractor was required to make the complainant whole, a remedy that included back pay.[328] Only if the federal contractor failed to comply with these directives within thirty days would its contracts with the government, and its

322. 41 C.F.R. § 60-741.28(b) (1980).

323. 485 F. Supp. 66 (N.D. Cal. 1979).

324. *Id.* at 75-76 (footnote omitted).

325. 19 F.E.P. Cases (BNA) 1624 (U.S. Dep't of Labor 1979). E.E. Black sought judicial review of the Administrative Order by initiating a suit against the Secretary of Labor and others. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980). Black alleged, among many other things, that the Administrative Order was based upon an incorrect and unlawful standard for determining whether an individual had a handicap under the Rehabilitation Act. *Id.* at 1096. Black's motion for summary judgment was denied. *Id.* at 1104.

326. The contractor refused to hire the complainant as a carpenter's apprentice because a medical examination revealed that he had a back condition which might lead to future injury. The contractor conceded that the complainant was capable of performing the job at the time he was refused employment.

327. 19 F.E.P. Cases at 1636.

328. *Id.* at 1636-37.

eligibility for future contracts, be terminated.[329] The relief granted the complainant seems to provide the "narrow, specific relief" that the *Hart* court feared might not result from the administrative enforcement of section 503.[330]

Moreover, as opposed to the effect of the termination of assistance in *Cannon*,[331] the final Administrative Order in *E.E. Black* did provide the complainant with the relief that he sought: the federal contractor was required to offer him employment and to give him back pay. Thus, administrative enforcement can provide an appropriate and efficient remedy for violations of section 503. Such relief would not be significantly different from that available in a private lawsuit. The availability of other appropriate remedies does not mean, of course, that a private cause of action should not be implied under section 503. It means, rather, that the implication of a cause of action under that statute cannot be justified on the ground that administrative enforcement of section 503 cannot produce a result as "appropriate" or "efficient" as a private lawsuit could produce.

Private Right of Action: Necessary Participation by the Complainant

In *Cannon*, the Supreme Court asserted in a footnote that it had "never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute."[332] The court in *Chaplin v. Consolidated*

329. *Id.* at 1636.

330. It is useful to distinguish the concept of "relief" from the concept of "sanction." "Relief" refers to what the complainant seeks, such as an offer of employment and other forms of redress. "Sanction" refers to the consequences that flow from failure to comply with the Administrative Order. It is possible that relief can be "narrow" and "specific" even where the sanction imposed is "severe." As a practical matter, the "severity" of contract termination and debarment will vary depending upon the economic significance to the federal contractor of his dealings with the federal government. In any event, it does appear that administrative enforcement can give appropriate relief for a violation of § 503. Of course, the limited experience with administrative enforcement of § 503 requires that this conclusion be regarded as tentative.

331. In *Cannon*, the Supreme Court indicated its concern that, even if the recipient of federal financial assistance were found to have engaged in sex-based discrimination, the termination of that financial assistance would not give the person subject to the discrimination what he or she wanted most: admission to the educational institution in question. *See* 441 U.S. at 704-06. Accordingly, the Supreme Court reasoned, because the statutorily prescribed remedy of a cutoff of financial assistance would not necessarily provide the relief sought, "the violation of Title IX might be remedied more efficiently by an order [in a private lawsuit] requiring an institution to accept an applicant who had been improperly excluded." *Id.* at 705 (footnote omitted).

332. *Id.* at 707 n.41.

Edison Co.[333] and the dissent in *Rogers v. Frito-Lay, Inc.*[334] advanced an analogous argument with respect to section 503, suggesting that, while the statute allows the complainant to initiate the proceedings, neither the statute nor the regulations permit the complainant to participate.[335]

The regulations promulgated by the DOL to implement section 503 do, however, appear to permit the complainant to participate in the proceedings. If an investigation of a complaint indicates a violation of the affirmative action clause and the Director of the OFCCP proposes to withhold progress payments, terminate existing contracts, or debar the contractor from future contracts, the contractor is entitled to a formal hearing.[336] The rules of procedure contemplate participation by interested parties,[337] providing in relevant part that "persons . . . shall have the right to participate as parties if the final Administrative Order could adversely affect them . . . and such participation may contribute materially to the proper disposition of the proceedings."[338]

A handicapped complainant who alleges that a federal contractor has violated the affirmative action provision in a federal contract obviously could be adversely affected by a final Administrative Order that concluded that the contractual provision had not been violated. Accordingly, the handicapped complainant would be entitled to participate, subject only to the condition that "such participation may contribute materially to the proper disposition of the proceeding." As a practical matter, the complainant will almost certainly be a witness at the hearing; it is unlikely, therefore, that this condition would not be satisfied. Therefore, a private cause of action need not be implied to permit participation by the complainant.

Opening the Floodgates of Litigation

In his dissenting opinion in *Cannon*, Justice Powell articulated his fear that the continued application of what he regarded as the Court's nonrestrictive approach to implication would open the "floodgates" of

333. 482 F. Supp. 1165 (S.D.N.Y. 1980).

334. Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 449 U.S. 889 (1980).

335. *Id.* at 1105 (Goldberg, J., dissenting); 482 F. Supp. at 1172.

336. 41 C.F.R. § 60-741.29(a) (1980). The DOL regulations incorporate by reference the rules of procedure employed in hearings conducted under Executive Order 11,246, 3 C.F.R. 339 (1964-1965 compilation), *reprinted in* 42 U.S.C. § 2000e app. at 1232 (1976). *See* 41 C.F.R. § 60-741.29(b)(3) (1980).

337. 41 C.F.R. §§ 60-30.14 to .24 (1980).

338. *Id.* § 60-30.24(a)(2).

litigation.[339] In support of his position, he noted that within the four-year interval between the *Cort* and *Cannon* decisions the courts of appeals had implied private causes of action in twenty decisions, implying remedies under fourteen separate statutory provisions.[340] In view of these facts, Justice Powell's fear of a flood of cases cannot be lightly dismissed.

In addition, the majority opinion in *Cannon* expressed displeasure at the necessity for federal courts continually to resolve suits predicated on implied causes of actions, suggesting that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights."[341] Similarly, the majority opinion in *Touche Ross & Co. v. Redington*[342] demonstrated an increasing impatience with implied causes of action litigation.[343]

It is possible that the Court's more restrictive approach in *Transamerica* is at least partially attributable to the Court's displeasure with the seemingly endless stream of implied private right of action cases it must consider. Congress clearly has the power, however, subject only to the limitations imposed by the Constitution, to impose, modify, or repeal liability, and to provide for the enforcement of that liability through private lawsuits. Congress might unwisely choose to create expressly a cause of action that produces a deluge of lawsuits. If the judicial system is overwhelmed as a result, the remedy is through the electoral process, and not through a refusal by the courts to apply the law.

If Congress has created no express remedy, the crucial issue is the intent of Congress to create a private remedy, not the delaying effect of the cause of action. If it is clear that Congress intended to permit private lawsuits, then this decision, although not expressed in the statute, should not be overruled by the courts under the guise of the floodgates argument. On the other hand, if there is not a clear indication of legislative intent that private lawsuits be permitted, then a cause of action should not be implied.

When the intent to permit private suits is clearly manifested, as it

339. 441 U.S. 677, 740-42 (1979) (Powell, J., dissenting).

340. *Id.* at 741-42.

341. *Id.* at 717 (Stevens, J.).

342. 442 U.S. 560 (1979).

343. "Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari." *Id.* at 562 (Rehnquist, J.).

is in the case of section 503, then the floodgates argument should not be considered; this argument could only serve to deflect inquiry from the real issue, legislative intent. The floodgates argument is irrelevant to the question of the existence of a private cause of action.

Conclusion

As all four *Cort* tests are satisfied,[344] a cause of action may properly be implied under section 503. Nevertheless, the clear weight of judicial authority, as exemplified by all of the section 503 decisions of the circuit courts of appeals, is to the contrary. The appellate decisions appear to reflect accurately the Supreme Court's recent emphasis on proof of congressional intent to create an implied private remedy. The 1978 amendments to the Rehabilitation Act, however, do provide the necessary proof.

It is useful here to take a broader perspective. As the clear weight of judicial authority is against implication under section 503, an observer might conclude that the courts' resolution of the issue would please the congressional opponents of private enforcement. One rather remarkable fact, however, has gone unnoticed in both the cases and the relevant commentary: there is no evidence of any congressional opponents to private enforcement of section 503. Research concerning the enactment of the Rehabilitation Act, the 1974 amendments, and the 1978 amendments, as well as their respective legislative histories, has failed to disclose even one statement, at any time, by any member of Congress, that could even remotely be described as manifesting hostility towards the enforcement of section 503 by private suits. Courts that have prohibited implication have concluded that Congress did not intend to create a private cause of action under section 503 without the benefit of a single statement supporting this position. All the express statements of legislative intent concerning implication under section 503 support the implication of a private remedy.

The only significant indication of a legislative intent to deny a private cause of action under section 503 is the existence of the express provision for administrative enforcement in section 503(b) together with the principle of *expressio unius*. That principle, like other rules of statutory construction, is only a presumption. In the case of section 503, that presumption is based on silence. *Expressio unius assumes* that the legislature's silence is purposeful and that it indicates an intention to preclude all remedies other than those expressed.

344. Regarding the fourth *Cort* factor, see note 11 & accompanying text *supra*.

Silence, however, is ambiguous. In view of the ambiguous nature of silence, the Supreme Court has been simply unwilling to apply *expressio unius* absent some supporting legislative history demonstrating that the express remedies were intended to be exclusive. The exception, of course, is *Transamerica*, in which the Supreme Court invoked the maxim of *expressio unius* despite a completely silent legislative history. This case, however, is distinguishable from the factual and legal situation surrounding section 503. Although the contemporaneous legislative history of section 503 is silent with respect to private enforcement, subsequent legislative history forcefully supports implication. In *Transamerica*, no comparable subsequent legislative history of the Investment Advisers Act was available.

The ultimate issue is which is the more reliable guide to Congress's intent with respect to private enforcement of section 503: its silence in 1973, or its express subsequent statements in 1978. The courts that have relied on *expressio unius* to conclude, after the adoption of the 1978 amendments, that a cause of action should not be implied under section 503, have accorded Congress's initial silence greater deference than its express subsequent statements. This resolution of the issue is wholly inappropriate. Congress's silence in 1973 is at most ambiguous, while the totality of the statements made and actions taken in connection with the adoption of the 1978 amendments is rather plainly unambiguous. In the context of the implication of a private cause of action under section 503, silence should not reign; express legislative intent should.